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### The Scrivener's Error

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## THE SCRIVENER'S ERROR

*Ryan D. Doerfler*

**ABSTRACT**—It is widely accepted that courts may correct legislative drafting mistakes, i.e., so-called scrivener's errors, if and only if such mistakes are "absolutely clear." The rationale is that if a court were to recognize a less clear error, it might be "rewriting" the statute rather than correcting a technical mistake.

This Article argues that the standard is much too strict. The current rationale ignores that courts can "rewrite," i.e., misinterpret, a statute both by recognizing an error and by failing to do so. Accordingly, because the current doctrine is designed to protect against one type of mistake (false positives) but not the other (false negatives), it systematically underrecognizes errors and results in systematic misinterpretation of the law.

Using the example of *King v. Burwell*, this Article shows that the overly strict scrivener's error doctrine threatens dramatic real-world harm. In *King*, opponents of the Affordable Care Act exploited a likely, but less than absolutely clear, scrivener's error to nearly bring down the most significant health reform legislation of the past half century. More still, the challenge only failed because six Justices were willing to accept an implausible textual argument. Furthermore, *King* is far from sui generis. Recent challenges to ambitious executive branch action, for example, try to take similar advantage of the current doctrine.

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# NORTHWESTERN UNIVERSITY LAW REVIEW

INTRODUCTION .....	812
I. WHAT IS A SCRIVENER'S ERROR? .....	816
A. <i>Difference in Degree</i> .....	817
B. <i>Difference in Kind</i> .....	819
II. WHY RECOGNIZE A SCRIVENER'S ERROR? .....	823
A. <i>Two Types of Intention</i> .....	824
B. <i>The Absurdity Doctrine</i> .....	830
III. WHEN TO RECOGNIZE A SCRIVENER'S ERROR? .....	834
A. <i>More Likely Than Not</i> .....	835
B. <i>Distorted Argumentation</i> .....	843
CONCLUSION .....	857

*It is, of course, an indispensable part of a scrivener's business to verify the accuracy of his copy, word by word. Where there are two or more scribes in an office, they assist each other in this examination, one reading from the copy, the other holding the original. It is a very dull, wearisome, and lethargic affair.*<sup>†</sup>

## INTRODUCTION

Speakers occasionally misspeak. Congress is no exception. Like the rest of us, Congress sometimes says “and” when it means to say “or,”<sup>1</sup> or “less” when it means to say “more.”<sup>2</sup> Courts take this into account, but only in “rare” cases.<sup>3</sup> Pursuant to the “scrivener’s error” doctrine, courts recognize a “meaning genuinely intended but inadequately expressed” if and only if Congress’s inadequately expressed intention is “absolutely clear.”<sup>4</sup> If, by contrast, misexpression is merely “likely,”<sup>5</sup> courts disregard Congress’s likely intention, instead enforcing a statute “as written.”<sup>6</sup> Thus,

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<sup>†</sup> HERMAN MELVILLE, *BARTLEBY THE SCRIVENER: A STORY OF WALL STREET* 31 (Simon & Schuster 1997) (1853).

<sup>1</sup> See *United States v. Pabon-Cruz*, 391 F.3d 86, 98 (2d Cir. 2004).

<sup>2</sup> See *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc.*, 435 F.3d 1140, 1145–46 (9th Cir. 2006).

<sup>3</sup> *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991) (“We do not believe that this is one of those rare cases where the application of the statute as written will produce a result ‘demonstrably at odds with the intentions of its drafters.’” (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982))); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989).

<sup>4</sup> *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 82 (1994) (Scalia, J., dissenting).

<sup>5</sup> See *Clinton v. City of New York*, 524 U.S. 417, 455 (1998) (Scalia, J., concurring in part and dissenting in part) (“It may be unlikely that this is what Congress actually had in mind; but it is what Congress said, it is not so absurd as to be an obvious mistake, and it is therefore the law.”).

<sup>6</sup> *Demarest*, 498 U.S. at 190.

110:811 (2016)

*The Scrivener's Error*

if Congress says “and” but only likely means to say “or,” it falls on Congress to correct its likely mistake.<sup>7</sup> Until it does, “and” means *and*.

Scrivener’s errors are largely unaddressed by existing scholarship—the most influential discussion of the topic to date is contained in a single footnote.<sup>8</sup> What scholarship there is is basically supportive of the current doctrine. John Manning, for example, suggests that courts *may* be right to recognize scrivener’s errors so long as those errors are “obvious.”<sup>9</sup> Others insist that error recognition *is* appropriate, but only in “extreme circumstances,”<sup>10</sup> or if evidence of error is “near conclusive.”<sup>11</sup>

This Article argues that, even on its own terms, the current scrivener’s error doctrine is erroneous. It produces systematic misinterpretation in the form of systematic underrecognition of errors. Courts insist time and again that the measure of statutory interpretation is Congress’s intent, appropriately conceived.<sup>12</sup> Yet by this measure, the current doctrine reliably delivers the wrong results. To explain, the rationale for recognizing only “absolutely clear” scrivener’s errors is that, if a court were to recognize a less clear error, it “might be rewriting the statute rather than correcting a technical mistake.”<sup>13</sup> But as this Article shows, the reverse is often true. If a scrivener’s error is more likely than not, but less than “absolutely clear,” a court is—by its own lights—probably “rewriting the statute” by *refusing* to recognize the likely error. After all, a court in such a case finds itself in the embarrassing position of having to say (or at least think), “Congress probably meant one thing, but we are going to act as if it meant something

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<sup>7</sup> See *Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004) (“If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent.”).

<sup>8</sup> See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2459 n.265 (2003) [hereinafter Manning, *The Absurdity Doctrine*].

<sup>9</sup> *Id.* (arguing that error recognition may be permissible “when an internal textual inconsistency or an obvious error of grammar, punctuation, or English usage is apparent from reading a word or phrase in the context of the text as a whole,” such that “there is only the remotest possibility that any such clerical mistake reflected a deliberate legislative compromise”); see also Andrew S. Gold, *Absurd Results, Scrivener’s Errors, and Statutory Interpretation*, 75 U. CIN. L. REV. 25, 28 (2006) (arguing that textualism allows for recognition of scrivener’s errors only if “obvious”).

<sup>10</sup> Michael S. Fried, *A Theory of Scrivener’s Error*, 52 RUTGERS L. REV. 589, 613–14 (2000).

<sup>11</sup> John David Ohlendorf, *Textualism and the Problem of Scrivener’s Error*, 64 ME. L. REV. 119, 155 (2011) (arguing that recognition of a scrivener’s error is permissible “only in the very rare case where there is near-conclusive evidence” of error).

<sup>12</sup> See, e.g., *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398–99 (2011) (Thomas, J.) (“This understanding of the text is compelled by ‘the broader context of the statute as a whole,’ which demonstrates Congress’[s] intent to channel prisoners’ claims first to the state courts.” (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997))); *Jones v. R. R. Donnelley & Sons*, 541 U.S. 369, 377 (2004) (Stevens, J.) (“In order to ascertain Congress’[s] intent, therefore, we must look beyond the bare text of § 1658 to the context in which it was enacted and the purposes it was designed to accomplish.”). This leaves open whether the “intent” in which a court should be interested is Congress’s actual, historical intent or its so-called objectified intent. See *infra* note 67.

<sup>13</sup> *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 82 (1994) (Scalia, J., dissenting).

else.” Put differently, the problem with the rationale for the current doctrine is that it ignores that courts can misinterpret both by recognizing an error and by failing to do so. Accordingly, because the current doctrine is designed to protect against one type of mistake (false positives) but not the other (false negatives), the doctrine consistently underrecognizes scrivener’s errors.

The current scrivener’s error doctrine, in addition to promoting inaccuracy, encourages distorted argumentation. Take, as an example, the recent dispute over insurance subsidies and the Patient Protection and Affordable Care Act (PPACA)<sup>14</sup> in *King v. Burwell*.<sup>15</sup> In that case, the question before the Court was whether a provision of the tax code authorizing subsidies for health insurance purchased through “Exchange[s] *established by the State*” included insurance purchased through both state-run and federally facilitated exchanges, or through state-run exchanges alone.<sup>16</sup> As this Article explains, it is likely that the provision at issue in *King* contains a simple scrivener’s error, namely the accidental omission of the phrase “or by the Secretary [of Health and Human Services].” Because, however, that error is less than “absolutely clear,” the current doctrine prevented the Government and supporting amici from advancing that argument. Instead, the Government and certain amici opted to argue—far less plausibly—that the provision at issue was worded precisely, and that “Exchanges established by the State” just means *Exchanges established by the State or by the Secretary*.<sup>17</sup> Meanwhile, other amici opted to argue that the Court should rely on substantive canons of construction to adopt the more inclusive reading based upon federalism concerns.<sup>18</sup> On pains of misconstruing the statute and, in turn, “destroy[ing]” health insurance markets throughout the country, the Court accepted the first argument; for that reason, it did not have to reach the second.<sup>19</sup> Regardless, each argument is dismaying in its own way. The first suggests that words can mean anything, and the second that courts may rewrite statutes in the service of lofty constitutional values.

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<sup>14</sup> Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S.C.).

<sup>15</sup> No. 14-114 (U.S. June 25, 2015).

<sup>16</sup> *Id.* at 5 (quoting 26 U.S.C. § 36B(c)(2)(A)(i) (2012)).

<sup>17</sup> See *id.* at 8; Brief for the Respondents at 20–25, *King*, No. 14-114 (U.S. June 25, 2015), 2015 WL 349885, at \*20–25; Brief of William N. Eskridge, Jr., John A. Ferejohn, Charles Fried, Lisa Marshall Manheim, & David A. Strauss as *Amici Curiae* in Support of Respondents, at 15–16, *King*, No. 14-114 (U.S. June 25, 2015), 2015 WL 428994, at \*15–16 [hereinafter Textualism Brief].

<sup>18</sup> See Brief for Professors Thomas W. Merrill, Gillian E. Metzger, Abbe R. Gluck, & Nicholas Bagley as *Amici Curiae* Supporting Respondents, at 6–7, *King*, No. 14-114 (U.S. June 25, 2015), 2015 WL 456257, at \*6–7 [hereinafter Federalism Brief].

<sup>19</sup> See *King*, slip op. at 20–21.

110:811 (2016)

*The Scrivener's Error*

Put more generally, the current scrivener's error doctrine encourages litigants and, in turn, courts to treat statutory language as highly malleable. This conclusion is both surprising and disturbing; after all, the stated rationale for the current doctrine is to avoid "rewriting" statutes. But as the majority opinion in *King* illustrates, the current scrivener's error doctrine discourages rather than encourages careful reading of statutory texts. More still, the problem in *King* is not sui generis. To the contrary, likely, but less than absolutely clear, drafting mistakes are pervasive in American law.<sup>20</sup> The distorting effect of the current doctrine is thus significant.

The current doctrine is particularly problematic under contemporary legislative conditions. Today's statutes are enormous and complex, containing almost innumerable cross-references and interdependent provisions. So it is perhaps unsurprising that alterations to one part of a statute often go unreflected in others, not by design but due to oversight<sup>21</sup>—imagine how long it would take Bartleby to read aloud all 906 pages of the PPACA.<sup>22</sup> Under these conditions, the assumption that Congress has chosen its words with near-perfect precision is especially dubious. To make matters worse, today's Congress is beset by unprecedented partisan gridlock.<sup>23</sup> Under *these* conditions, the familiar consolation that "if Congress doesn't like it, it can fix it,"<sup>24</sup> offers no consolation at all.<sup>25</sup>

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<sup>20</sup> See, e.g., *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 565 (2005) (omission of language); *Holloway v. United States*, 526 U.S. 1, 7–8 (1999) (placement of language); *Clinton v. City of New York*, 524 U.S. 417, 429 (1998) (substitution of language); *City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 337 & n.3 (1994) (omission of language); *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440 (1989) (substitution of language); *United States v. Locke*, 471 U.S. 84 (1985) (substitution of language); *Lewis v. Alexander*, 685 F.3d 325, 351–52 (3d Cir. 2012) (omission of language); *Owner–Operator Indep. Drivers Ass'n v. Mayflower Transit, LLC*, 615 F.3d 790, 792 (7th Cir. 2010) (nonupdated cross-reference); *Serv. Emps. Int'l, Inc. v. Dir., Office of Workers Comp. Program*, 595 F.3d 447, 454–55 (2d Cir. 2010) (nonupdated language); *United States v. Olander*, 572 F.3d 764 (9th Cir. 2009) (omission of language); *United States v. Head*, 552 F.3d 640 (7th Cir. 2009) (omission of cross-reference); *Engine Mfrs. Ass'n v. U.S. EPA*, 88 F.3d 1075 (D.C. Cir. 1996) (omission of language).

<sup>21</sup> See, e.g., *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 498 (1999) (Stevens, J., concurring in the judgment) ("The [Act] is a part of an omnibus enactment that occupies 750 pages in the Statutes at Large. It is not surprising that it contains a scrivener's error." (citation omitted)); *Am. Petrol. Inst. v. SEC*, 714 F.3d 1329, 1336–37 (D.C. Cir. 2013) (observing numerous scrivener's errors in the Dodd–Frank Act, calling the Act "an enormous and complex statute").

<sup>22</sup> For comparison, whereas the U.S. Constitution contains 4543 words, the PPACA contains 381,517 words. Ali Meyer, *Obama's EPA Regulations: 6,552x as Long as Constitution; 46x as Long as Bible*, CNSNEWS.COM (June 8, 2015, 5:31 PM), <http://www.cnsnews.com/news/article/ali-meyer/obamas-epa-regulations-6552x-long-constitution-46x-long-bible> [<https://perma.cc/RSU4-JA5W>].

<sup>23</sup> See Sarah Binder, *The Dysfunctional Congress*, 18 ANN. REV. POL. SCI. 85, 86 (2015) ("[E]ven when Congress and the president manage to reach agreement on the big issues of the day, the intense partisanship and electoral competition of recent years appears to be undermining Congress's broader problem-solving capacity.").

<sup>24</sup> See *Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004) ("If Congress enacted into law something different from what it intended, then it should amend the statute to conform to its intent.").

Scrivener's errors are the proverbial elephant in the mousehole.<sup>26</sup> Typographical errors and the like seem the very definition of trivial. As *King* shows, however, such legislative snafus threaten dramatic real-world consequences so long as the scrivener's error doctrine remains confused. The current approach persists, perhaps, because scholars have failed to subject it to serious scrutiny. This Article fills that void. In so doing, it exposes as reckless a doctrine assumed by almost all to be appropriately cautious.

This Article has three Parts. Part I offers a conceptual analysis of scrivener's errors, distinguishing scrivener's errors from other types of legislative mistake. Part II explains the connection between scrivener's errors and legislative intent. It shows that both textualists and purposivists are right to recognize such errors. This Part also clarifies the relationship between the scrivener's error doctrine and the so-called absurdity doctrine. Part III argues that the current scrivener's error doctrine is misguided, and that courts should recognize such errors much more freely. This Part also responds to the objection that a more permissive scrivener's error doctrine would invite judicial willfulness or motivated reasoning, as well as the objection that such a doctrine would encourage sloppier drafting by Congress.

## I. WHAT IS A SCRIVENER'S ERROR?

A scrivener is (or, better, was) a transcriber of documents.<sup>27</sup> In the literal sense, then, a "scrivener's error" is a mistake of transcription, which is to say a mismatch between original (e.g., spoken word, manuscript) and copy. Today, of course, Congress does not use actual scribes. Indeed, the phrase "scrivener's error" came into popular usage only once reliance upon scribes was uncommon.<sup>28</sup> The phrase is thus a term of art, referring to a particular sort of legislative mistake. Specifically, and as explained more fully throughout Part I, a "scrivener's error" is a case in which the words of a legislative text diverge from what Congress *meant* to say. Such a case contrasts with one in which Congress simply *should* have said

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<sup>25</sup> See Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 209 (2013) (observing that congressional overriding of statutory decisions by the Supreme Court has dropped sharply in recent decades).

<sup>26</sup> *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

<sup>27</sup> See MELVILLE, *supra* note †, at 19 (describing a scrivener as a "law-copyist").

<sup>28</sup> State courts started to use the phrase around the turn of the century. See, e.g., *Pond v. Montgomery*, 22 Haw. 241, 242 (1914); *McKibbin v. Peters*, 40 A. 288, 290 (1898). Federal courts appear not to have used the phrase before the 1950s. See *John Hancock Mut. Life Ins. Co. v. Cohen*, 254 F.2d 417, 420 (9th Cir. 1958).

110:811 (2016)

*The Scrivener's Error*

something else. Or, to use Justice Scalia's gloss, a scrivener's error is a "mistake of expression," as opposed to a lapse of "legislative wisdom."<sup>29</sup>

This Part tries to render precise the distinction between *meant* to say and *should* have said. It helps to start with some paradigm cases. Suppose that you are standing in the security line at the airport and you see a sign posted by the Transportation Security Administration (TSA) that reads, "Please remove your shoe." In that case, you would likely assume that the sign contains a typographical error, and that what TSA *meant* to say was, "Please remove your shoes." Suppose now that you have cleared security and you ask a TSA agent, "Excuse me, where can I find a restroom?" The agent responds, "Across from gate 46." Unbeknownst to her, the restroom across from gate 46 is closed for repairs. As a result, the closest functioning restroom is the one across from gate 62. In that case, what the TSA agent *meant* to say was, "Across from gate 46." What she *should* have said, by contrast, is, "Across from gate 62."

Or take legislative examples. The Animal Welfare Act operates to, among other things, "insure that animals . . . are provided humane care and treatment."<sup>30</sup> Here, Congress plainly meant to say, "ensure."<sup>31</sup> The Act imposes various conduct requirements for those interacting with nonhuman animals;<sup>32</sup> it does not establish an insurance scheme. Contrast this with the Defense of Marriage Act, which restricted federal recognition of marriage to unions between "person[s] of the opposite sex."<sup>33</sup> There, what Congress meant to say was, without question, "person[s] of the opposite sex." Yet, as the Court recognized in *United States v. Windsor*,<sup>34</sup> what Congress should have said was, "person[s] of the *same or* opposite sex." Or, better still, Congress should have said nothing at all.

#### A. *Difference in Degree*

Turn now to the specifics of the distinction. One possibility is that the difference between *meant* to say and *should* have said is one of degree rather than kind. One might argue that the difference is in the degree of

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<sup>29</sup> Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 20 (Amy Gutmann ed., 1997).

<sup>30</sup> 7 U.S.C. § 2131(1) (2012) (emphasis added).

<sup>31</sup> This particular scrivener's error is especially pervasive. See, e.g., 15 U.S.C. § 1681k(a)(2) (2012); 16 U.S.C. § 3171(b) (2012); 42 U.S.C. § 2996f(a)(2)(B) (2012).

<sup>32</sup> See, e.g., 7 U.S.C. § 2144 (requiring government actors to comply with humane standards for animals in laboratory settings).

<sup>33</sup> 1 U.S.C. § 7 (2012).

<sup>34</sup> 133 S. Ct. 2675, 2693–96 (2013) (holding this portion of the Defense of Marriage Act unconstitutional).



confidence one has that the speaker would regard her statement as a mistake. Put slightly differently, perhaps the difference is in the degree of confidence on the part of the listener that the speaker would want the listener to correct her statement. To render this thought more precise, maybe to say that a person “meant” to say that *p* is to say that that person *certainly* would have said that *p* if she had been attentive to pertinent information. So, for example, to say that Congress “meant” to say that the Animal Welfare Act operates to “*ensure* . . . humane care and treatment” is to say that, if it had been attentive to the respective meanings of “insure” and “ensure,” that is what Congress *certainly* would have said. By contrast, the claim continues, to say that a person “should” have said that *p* is to say that that person *probably* would have said that *p* if she had been appropriately attentive. Thus, to say that Congress “should” have said nothing about what combination of persons constitutes a “marriage” is to say that, had Congress been attentive to pertinent moral and constitutional considerations, it probably would have said—or, better, *not* said—just that.<sup>35</sup>

The degree-of-confidence analysis is nonrevisionary in that it helps to make sense of the current scrivener’s error doctrine. If Congress “meant” to say that *p* only if it is certain that Congress would have said that *p* under improved epistemic conditions, then it could make sense for courts to recognize a scrivener’s error just in the case where the error is “absolutely clear.” If the error is less than “absolutely clear,” after all, it is less than certain that Congress would appreciate correction. In that case, it may be that Congress “should” have said something else, i.e., that Congress *probably* would have spoken differently under improved epistemic conditions. But that would be a lapse of “legislative wisdom,” not a “mistake of expression.”

In other words, perhaps it is not, as suggested above, that courts recognize only scrivener’s errors that are “absolutely clear.” Maybe it is, instead, that courts recognize only errors that are “absolutely clear,” labeling such errors “scrivener’s errors.”

The problem with the degree-of-confidence analysis is that it is subject to easy counterexample. First, not all clear mistakes are “mistake[s] of expression.” Suppose, for example, that a jury says that a defendant is “guilty,” but that exonerating DNA evidence later emerges. In that case, the jury *certainly* would have said, “*not* guilty,” had it been attentive to the newfound evidence. Nonetheless, the jury plainly *meant* to say, “guilty.” Similarly, the Anti-Drug Abuse Act of 1986 established a mandatory

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<sup>35</sup> Wishful thinking, perhaps.

110:811 (2016)

*The Scrivener's Error*

minimum sentence of five years for possession of “5 grams” of crack cocaine, as contrasted with a five-year minimum for possession of “500 grams” of powder cocaine.<sup>36</sup> This 100:1 disparity was predicated upon the “myth” that crack cocaine is significantly more dangerous than powder cocaine.<sup>37</sup> Recognizing its mistake, Congress, in 2010, increased the triggering amount of crack cocaine to “28 grams.”<sup>38</sup> One can assume Congress would have said something similar in 1986 had it known then what it knows now. Still, in 1986, what Congress *meant* to say was, without question, “5 grams.”

Second, not all “mistake[s] of expression” are clear mistakes. Say that the President is scheduled to meet with the Secretary of Labor on Thursday but often has to reschedule last minute. Earlier in the week, the President says to the Secretary, “I look forward to our meeting on Friday.” The Secretary pauses, reasonably uncertain whether the President’s remark indicates a change in schedule. The President then corrects, “Sorry, I meant to say, ‘Thursday.’” Likewise, in November 2003, the Department of Treasury amended the regulations implementing the Bank Secrecy Act, enlarging the set of “financial institutions” required to report “suspicious transactions.”<sup>39</sup> Curiously and without remark, the definition of “transaction” established by the Department’s amendments omitted a type of transaction, purchase, or redemption of casino chips covered by the previous definition.<sup>40</sup> Had the Department just narrowed the reporting requirement intentionally? Less than clear—at least until January 2004, when the Department clarified that the omission was “an inadvertent typographical error,” amending the definition accordingly.<sup>41</sup>

### *B. Difference in Kind*

The above examples suggest that the difference between *meant* to say and *should* have said is one of kind rather than degree. But what is the difference? Recall that a scrivener’s error is a *linguistic* error, as opposed to

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<sup>36</sup> Pub. L. No. 99-570, § 1002, 100 Stat. 3207, 3207-3 (codified as amended at 21 U.S.C. § 841(b)(1)(B)).

<sup>37</sup> 155 CONG. REC. 24,954 (2009) (statement of Sen. Durbin).

<sup>38</sup> Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2(a), 124 Stat. 2372, 2372 (codified at 21 U.S.C. § 841 (b)(1)(B)(iii)).

<sup>39</sup> Definition of Futures Commission Merchants and Introducing Brokers in Commodities as Financial Institutions, 68 Fed. Reg. 65,392, 65,398 (Nov. 20, 2003) (codified as amended at 31 C.F.R. pt. 103).

<sup>40</sup> Compare *id.*, with 31 C.F.R. 103.11 (2002).

<sup>41</sup> Definition of Futures Commission Merchants and Introducing Brokers in Commodities as Financial Institutions, 69 Fed. Reg. 4236, 4236–37 (Jan. 29, 2004) (codified as amended at 31 C.F.R. pt. 103).

an error in nonlinguistic judgment.<sup>42</sup> Building upon this contrast, this Section argues that the difference between the two types of errors is in the type of information to which a speaker has failed to attend. On this view, to say that a person “meant” to say that *p* is to say that that person would have said that *p* if she had been attentive to pertinent *linguistic* information. For purposes of this analysis, linguistic information comes in two types. The first is information about the conventional meaning of words, phrases, or symbols (e.g., the respective meanings of “insure” and “ensure”). The second is information about the conversation at issue (e.g., that the speaker has said “and” rather than “or”). By contrast, to say that a person “should” have said that *p* is to say that that person would have said that *p* if she had been attentive to pertinent *nonlinguistic* information (e.g., that federal recognition only of opposite-sex marriages is both immoral and unconstitutional), which is to say, any information that is *not* specifically linguistic in character.

The type-of-information analysis explains numerous paradigmatic cases of scrivener’s error. First, the analysis fits what one might call slip-of-the-tongue cases—cases in which the author accidentally misuses words or punctuation. Included here are cases of misspelling,<sup>43</sup> misplaced punctuation,<sup>44</sup> or accidental omission or substitution of words.<sup>45</sup> In such cases, one can say that Congress *meant* to say, “*p*,” and not, “*q*,” because Congress would have said, “*p*,” had it been alerted to its having said, “*q*,” as opposed to, “*p*.” Prior to 2009, for example, the federal statute governing removal of class actions required that a petition to appeal an order of a district court granting or denying a motion to remand a class action to the state court from which it was removed be “made to the court of appeals not less than 7 days after entry of the order.”<sup>46</sup> Courts regarded this language as

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<sup>42</sup> Linguistic mistakes are fairly characterized as mistakes of judgment to the extent that linguistic competency reduces to a capacity for judgment concerning how to use words. See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 5 (P.M.S. Hacker & Joachim Schulte eds., G.E.M. Anscombe et al. trans., rev. 4th ed. 2009) (“A child uses such primitive forms of language when he learns to talk. Here the teaching of language is not explaining, but training.”).

<sup>43</sup> See *Hollender v. Magone*, 149 U.S. 586, 590 (1893) (“This retrospect of past legislation, as well as the character of the other beverages named in combination, indicates the meaning of the word ‘liquors’ as found in this paragraph of the statute of 1883. It is simply a case of misspelling, and ‘liqueurs’ was intended.”).

<sup>44</sup> See *Crandon v. United States*, 494 U.S. 152, 170 (1990) (Scalia, J., concurring in the judgment) (“[A] misplaced comma is more plausible than a gross grammatical error . . .”).

<sup>45</sup> See *United States v. Pabon-Cruz*, 391 F.3d 86, 105 (2d Cir. 2004) (“Accordingly, we hold that the ‘and both’ language contained in the enrolled version of the statute makes no sense as a matter of grammar, usage, or law; [and] that the ‘or both’ language . . . is what Congress contemplated . . .”).

<sup>46</sup> Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 5(a), 119 Stat. 4, 12 (emphasis added), amended by Statutory Time-Periods Technical Amendments Act of 2009, Pub. L. No. 111-16, § 6(2), 123 Stat. 1607, 1608 (codified as amended at 28 U.S.C. § 1453 (2012)).

110:811 (2016)

*The Scrivener's Error*

“illogical and contrary to the stated purpose of the provision,” namely “creat[ing] a time *limit* for appeal.”<sup>47</sup> Moreover, the accidental substitution of a word for its opposite is a common linguistic mistake (e.g., “before” for “after,” “up” for “down,” etc.). From this, courts rightly inferred that what Congress *meant* to say was, “not *more* than.”<sup>48</sup> Which is just to say (correctly) that Congress would have said, “not *more* than,” had it been alerted to its having said “not *less* than,” as opposed to “not *more* than.”

Second, the analysis fits what Richard Lazarus calls cases of intentional error—cases in which “the author intended to use the words or punctuation but was mistaken about their [linguistic] correctness.”<sup>49</sup> In such cases, one can say that Congress *meant* to say, “*p*,” and not, “*q*,” because Congress would have said, “*p*,” had it been alerted to the conventional meanings of “*q*” and “*p*,” respectively. The False Claims Act, for example, refers to the “Government Accounting Office” as opposed to the “General Accounting Office” (now the “Government Accountability Office”).<sup>50</sup> Here, Congress’s word choice was likely intentional, reflecting a common misunderstanding of the acronym “GAO.”<sup>51</sup> Nonetheless, the Supreme Court treated it as uncontroversial that what Congress *meant* to say was “General Accounting Office.”<sup>52</sup> Which, again, is just to say, correctly, that Congress would have said, “General Accounting Office,” had it been alerted to the conventional meanings of “Government Accounting Office” and “General Accounting Office,” respectively.

Third and most relevant to contemporary legislation, the analysis fits cases of “incomplete amendment”—cases in which the author intends an amendment to have global effect but accidentally fails to implement the amendment someplace. Here the paradigmatic case is one in which a statutory provision is renumbered, but a cross-reference to that provision goes unamended.<sup>53</sup> In such cases, one can say that Congress *meant* to say, “*p*,” and not, “*q*,” because Congress would have said, “*p*,” had it been alerted to its having said, “*p*,” in one place and, “*q*,” in another. In 1962, for

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<sup>47</sup> *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc.*, 435 F.3d 1140, 1146 (9th Cir. 2006).

<sup>48</sup> *See id.*; *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1093 n.2 (10th Cir. 2005).

<sup>49</sup> Richard J. Lazarus, *The (Non)Finality of Supreme Court Opinions*, 128 HARV. L. REV. 540, 563 (2014) (discussing the correction of errors in Supreme Court opinions).

<sup>50</sup> 31 U.S.C. § 3730(d)(1) & n.1 (2012).

<sup>51</sup> *See United States ex rel. Mistick PBT v. Hous. Auth. of Pittsburgh*, 186 F.3d 376, 398 (3d Cir. 1999) (Becker, C.J., dissenting) (noting that courts have “frequently” made the same mistake).

<sup>52</sup> *See Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 287 n.6 (2010).

<sup>53</sup> Renumbering can also result in a slip-of-the-tongue case if a cross-reference is updated incorrectly. *See Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1040–44 (D.C. Cir. 2001) (recognizing one such error resulting from the Clean Air Act Amendments of 1990).

example, Congress amended the Federal Food, Drug, and Cosmetic Act (FDCA), adding § 355(j) to require drug manufacturers to establish or maintain records about the manufacture and testing of drugs.<sup>54</sup> Thereafter, the failure to establish or maintain records under § 355(j) was a prohibited act under § 331(e) of the Act and subject to criminal penalties. In 1984, Congress amended FDCA again, enacting an abbreviated drug approval process for generics under § 355(j) and redesignating the old § 355(j) concerning recordkeeping as “§ 355(k).”<sup>55</sup> Congress failed, however, to amend § 331(e) to reflect this redesignation. As a result, § 331(e) continued to instruct that the failure to establish or maintain records under “§ 355(j)” was subject to criminal penalties, even though the new § 355(j) had nothing to do with recordkeeping. In *United States v. Bhutani*, the defendants argued that the 1984 amendments effectively eliminated criminal penalties for improper recordkeeping.<sup>56</sup> The Seventh Circuit disagreed, holding that what Congress *meant* to say in 1984 was that the failure to establish or maintain records under “§ 355(k)” was subject to criminal penalties.<sup>57</sup> Setting aside rule-of-lenity concerns, this seems right. Had Congress been alerted to its having, on the one hand, redesignated the recordkeeping provision as “§ 355(k)” and, on the other, its reiterating that improper recordkeeping under “§ 355(j)” was subject to criminal penalties, what Congress surely would have said is that criminal penalties were available for violations of “§ 355(k).” Indeed, that is what Congress did in 1990, passing a technical amendment to correct its mistake.<sup>58</sup>

In addition to paradigmatic cases, the analysis also fits anti-paradigmatic cases, i.e., common legislative mistakes that are plainly *not* scrivener’s errors. Take instances of “practical unwisdom”—when Congress exercises poor nonlinguistic judgment. In such cases, one can say that Congress *should* have said, “*p*,” and not, “*q*,” insofar as Congress would have said, “*p*,” had it been attentive to certain nonlinguistic information. One cannot, however, say that Congress *meant* to say, “*p*,” since attention to additional linguistic information would not have prompted it to say, “*p*.” Here, examples abound. No amount of attention to linguistic information would have prompted Congress in 1996 to remain silent on what constitutes a marriage. Nor in 1986 to set the triggering

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<sup>54</sup> Drug Amendments of 1962, Pub. L. No. 87-781, § 103(a), 76 Stat. 780, 782–83 (codified as amended at 21 U.S.C. § 355(j)).

<sup>55</sup> Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, § 101, 98 Stat. 1585, 1585 (codified as amended at 21 U.S.C. § 355(k)).

<sup>56</sup> 266 F.3d 661, 665 (7th Cir. 2001).

<sup>57</sup> *Id.* at 667–68 (emphasis added).

<sup>58</sup> Vaccine and Immunization Amendments of 1990, Pub. L. No. 101-502, § 5(j), 104 Stat. 1285, 1289 (codified as amended at 21 U.S.C. § 331(e)).

110:811 (2016)

*The Scrivener's Error*

amount for a five-year mandatory minimum sentence at some amount other than five grams of crack cocaine. In each case, Congress *should* have said something other than what it did, i.e., it would have spoken differently had it known more. Still, in each case, Congress plainly *meant* what it said.

In addition to case-fit, the type-of-information analysis preserves the normative significance of the distinction between scrivener's errors and other types of legislative mistake. As explained below, the basic argument for recognizing scrivener's errors is that doing so is part and parcel of giving effect to Congress's specific instructions. For that reason, recognizing scrivener's errors is consistent with the separation of powers principle that policy making is a job for Congress, not courts.<sup>59</sup> As observed at the outset, scrivener's errors are specifically *linguistic* mistakes and thus contrast with other types of legislative mistake, the recognition of which involves attributing to Congress a failure of policy judgment (e.g., limited foresight). By excluding from the category of scrivener's error mistakes owed to inattention to nonlinguistic—and therefore policy-relevant—information, the type-of-information analysis thus preserves that contrast, and, in turn, helps to ensure that courts do not substitute their policymaking judgment for Congress's. At least in this respect, the type-of-information analysis is nonrevisionary compared to degree-of-confidence analysis. The former, unlike the latter, reflects that there is good reason for courts to treat policy and linguistic mistakes differently.

## II. WHY RECOGNIZE A SCRIVENER'S ERROR?

Having gotten a sense of the distinction between *meant* to say and *should* have said, an immediate question is, why does it matter?

The simple reason is that the distinction corresponds to the basic separation of powers between the judiciary and the legislature. It is the role of the courts to “say what the law is.”<sup>60</sup> It is the role of the legislature to say what the law shall be.<sup>61</sup> As explained more fully below, saying what the law is requires that courts determine what Congress is trying to communicate.

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<sup>59</sup> See, e.g., Note, *Textualism As Fair Notice*, 123 HARV. L. REV. 542, 555 (2009) (arguing that textualism is grounded in part in a “concern[] that illegitimate expansion of the judicial power will disrupt the separation of powers and facilitate abusive judicial behavior”); Scalia, *supra* note 29, at 17–18 (“The *practical* threat [of purposivism] is that, under the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field.”); Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 718–23 (1978) (arguing that separation of powers limits judicial lawmaking).

<sup>60</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>61</sup> See, e.g., Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 545 (1947) (“In a democracy the legislative impulse and its expression should come from those popularly chosen to legislate, and equipped to devise policy, as courts are not.”).

And because Congress, like the rest of us, sometimes bungles in its efforts to communicate, this will sometimes involve judging what Congress *meant* to say as opposed to what Congress *said*. By contrast, judging what Congress *should* have said pertains not to the content of the law but rather to Congress's practical wisdom. "[T]he Constitution," however, "has not authorized the judges to sit in judgment on the wisdom of what Congress . . . do[es]."<sup>62</sup>

The more complicated reason is that the distinction has greater apparent significance because of what we now know about legislative intent.<sup>63</sup> It is a platitude that ours is a system of legislative supremacy.<sup>64</sup> From this, it is widely inferred that courts must act as faithful agents of Congress.<sup>65</sup> And from this, it is further inferred that courts must give effect to Congress's intent, appropriately conceived.<sup>66</sup>

#### A. Two Types of Intention

But how to conceive of Congress's intent?<sup>67</sup> One candidate is Congress's "practical intention"—its intention to remedy a particular

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<sup>62</sup> *Trop v. Dulles*, 356 U.S. 86, 120 (1958) (Frankfurter, J., dissenting); *accord* *Touby v. United States*, 500 U.S. 160, 168 (1991) (rejecting a claim on the ground that "it merely challenges the wisdom of a legitimate policy judgment made by Congress").

<sup>63</sup> For a more comprehensive discussion of legislative intent, see Ryan D. Doerfler, Fictionalism About Legislative Intent (Apr. 6, 2015) (unpublished manuscript), <http://ssrn.com/abstract=2637723> [<https://perma.cc/W87Q-SRSE>].

<sup>64</sup> See Edward H. Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 372 (1976) ("Congressional supremacy is said to be at the heart of the American tradition—which, after all, began in rebellion against prerogative and government without representation.").

<sup>65</sup> See John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 5 (2001) [hereinafter Manning, *Equity of the Statute*] ("In our constitutional system, it is widely assumed that federal judges must act as Congress's faithful agents."); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415 (1989) ("According to the most prominent conception of the role of courts in statutory construction, judges are agents or servants of the legislature.").

<sup>66</sup> See Manning, *The Absurdity Doctrine*, *supra* note 8, at 2395 & n.23 ("The Court has long emphasized that, as faithful agents of Congress, federal courts have a constitutional duty to implement Congress's 'intent.'").

<sup>67</sup> The discussion of intent in this Article is agnostic with respect to whether one should care about Congress's actual, historical intent, to the extent that it has one, see Doerfler, *supra* note 63 (arguing that Congress, as such, forms few if any intentions), or its "objectified intent." See, e.g., John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 424 (2005) [hereinafter Manning, *Legislative Intent*] (emphasis removed); Scalia, *supra* note 29, at 17. Objectified intent is best understood as the intent that one would attribute to Congress just on the basis of its having written the statute at issue in the context of enactment. See Doerfler, *supra* note 63, at 27. As explained more fully below, sometimes one would attribute to Congress, just on this basis, an intention to communicate something that does not correspond perfectly to the words that Congress used. For example, just on the basis of its using the word "insure" in the context of the Animal Welfare Act, one would attribute to Congress an intention to communicate *ensure*. Put more generally, the thought behind objectified intent is that one should attribute to Congress just those intentions one would attribute just on the basis of its having said what it said. What obvious scrivener's error cases show is that sometimes, just on this basis, one would attribute to Congress an intention to communicate something other than what it said. See

110:811 (2016)

*The Scrivener's Error*

“mischief.”<sup>68</sup> Congress enacts statutes to solve problems, whether real or perceived.<sup>69</sup> In enacting the Americans with Disabilities Act (ADA), for example, Congress’s practical intention was to help “eliminat[e] . . . discrimination against individuals with disabilities.”<sup>70</sup> In giving effect to the ADA, it would seem that a faithful-agent court must heed this intention.<sup>71</sup>

Another candidate is Congress’s “communicative intention”—its intention to communicate a particular proposition or propositions by enacting statutory language. Section 102(b) of the ADA, for instance, makes it unlawful for an employer to discriminate against a “qualified individual” on the basis of disability with respect to hiring.<sup>72</sup> In uttering this language, Congress’s communicative intention was to communicate the proposition that an employer may not discriminate against an individual qualified for the position for which she applied on the basis of that individual’s disability.<sup>73</sup> Again, in giving effect to section 102(b), it would seem that this intention binds a faithful-agent court.<sup>74</sup>

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Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 356 (2005) (“[W]hen an appropriately informed reader would conclude that the statutory text contains a scrivener’s error, textualists can assert that someone seeking the ‘objective’ meaning of the text would naturally correct the error.”). *Contra* Ohlendorf, *supra* note 11, at 142 (arguing that recognition of scrivener’s errors is inconsistent with skepticism about actual, historical intent). Similarly, the discussion in this Article is agnostic with respect to what sources of information courts should consider when discerning Congress’s intent. As I have explained more fully elsewhere, what information courts consider when making sense of some legislative text may affect its judgment as to whether that text contains an error. *See* Doerfler, *supra* note 63, at 29–30. As the previous example shows, however, some scrivener’s errors are clear even if the only information considered is the statutory text itself in combination with minimal background information (e.g., that the text at issue is statutory text).

<sup>68</sup> Frankfurter, *supra* note 61, at 538–39 (“Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government.”); *see also* Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370, 370 (1947) (observing that some “purpose lies behind all intelligible legislation”).

<sup>69</sup> This is common ground between purposivists and textualists. *Compare, e.g.*, Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 64 (1994) (“The goals, purposes, concerns, of the authors illuminate things.”), *with* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515 (“Surely one of the most frequent justifications courts give for choosing a particular construction is that the alternative interpretation would produce ‘absurd’ results, or results less compatible with the reason or purpose of the statute.”).

<sup>70</sup> 42 U.S.C. § 12101(b)(1) (2012).

<sup>71</sup> *Cf. Rostker v. Goldberg*, 453 U.S. 57, 68 (1981) (“In deciding the question before us we must be particularly careful not to substitute our judgment of what is desirable for that of Congress, or our own evaluation of evidence for a reasonable evaluation by the Legislative Branch.”).

<sup>72</sup> 42 U.S.C. § 12112(b).

<sup>73</sup> *Larimer v. IBM Corp.*, 370 F.3d 698, 700 (7th Cir. 2004) (Posner, J.) (“The term ‘qualified individual’ in that provision must simply mean qualified to do one’s job, as assumed though nowhere discussed in the legislative history and the cases.”).

<sup>74</sup> *Cf. Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 228 (2008) (“[Courts] are not at liberty to rewrite the statute to reflect a meaning we deem more desirable.”); *Hanover Bank v. Comm’r*, 369 U.S. 672, 682 (1962) (“[Courts] are bound by the meaning of the words used by Congress, taken in [context].”).



By focusing on Congress's communicative intention, this Article thus rejects the position that the communicative content of a statute consists of what Congress *said* regardless of what Congress *meant* to say. Textualists, for example, argue that respect for Article I, Section 7's requirements of bicameralism and presentment requires that courts attend to duly enacted statutory text, as opposed to the "unenacted" intentions of legislators.<sup>75</sup> From this, one might infer that recognition of garbled communicative intentions is per se impermissible. That inference, however, would be too quick. An intention, after all, is only "unenacted" if it is unexpressed by an enacted text. Thus, to the extent that a text expresses Congress's communicative intention, even if imperfectly, that intention is not "unenacted" in the relevant sense. For this reason, most textualists concede that, when interpreting some text, a court "must determine what Congress meant by what it enacted."<sup>76</sup> The intentions that are to be ignored, according to the textualist, are, therefore, those that are expressed only somewhere other than the text (e.g., legislative history).<sup>77</sup> Thus, with respect to communicative intention, even textualists are "intentionalists" in the relevant sense.<sup>78</sup>

Further, it is well established as a matter of positive law that the object of inquiry in statutory interpretation is Congress's communicative intention, appropriately conceived.<sup>79</sup> Courts freely engage in pragmatic inference when interpreting statutes, attributing to statutes communicative content that goes beyond what Congress has said.<sup>80</sup> Further, and most relevant here, courts accept uniformly that recognition of scrivener's errors is appropriate under certain conditions. If the communicative content of a statute were just what Congress *said*, courts would be barred from recognizing even the most obvious misspellings.<sup>81</sup>

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<sup>75</sup> See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452–53 (1987) (Scalia, J., concurring in the judgment) ("Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent.").

<sup>76</sup> *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 294 (7th Cir. 1992) (Easterbrook, J.) (emphasis removed); accord *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212 (2002) (Scalia, J.).

<sup>77</sup> See, e.g., *Cardoza-Fonseca*, 480 U.S. at 452–53 (Scalia, J., concurring in the judgment); *In re Sinclair*, 870 F.2d 1340, 1344 (7th Cir. 1989) (Easterbrook, J.) ("Legislative history then may help a court discover but may not change the original meaning.").

<sup>78</sup> Though, again, textualists are interested in Congress's "objectified" communicative intention, as opposed to its actual, historical intention. See *supra* note 67 and accompanying text.

<sup>79</sup> See *supra* note 12 and accompanying text.

<sup>80</sup> See Andrei Marmor, *The Pragmatics of Legal Language*, 21 *RATIO JURIS* 423 (2008); Doerfler, *supra* note 63, at 2–10.

<sup>81</sup> See Larry Alexander & Saikrishna Prakash, "Is That English You're Speaking?" *Why Intention Free Interpretation Is an Impossibility*, 41 *SAN DIEGO L. REV.* 967, 980 (2004) (arguing that

110:811 (2016)

*The Scrivener's Error*

As a practical matter, courts must consider Congress's practical and communicative intentions in tandem. On the one hand, courts agree that statutory text is the "best evidence" of Congress's practical intention in a given case.<sup>82</sup> And the linguistic content expressed by some statutory text is just Congress's apparent communicative intention.<sup>83</sup> On the other hand, courts must consider Congress's practical intention to discern its communicative intention most, if not all, of the time. Courts rightly treat it as obvious, for example, that "qualified individual" as used in ADA Section 102(b) is intended to refer to an individual qualified for the position for which she applied, as opposed to, say, qualified to operate a motor vehicle or qualified to vote.<sup>84</sup> The reason that Congress's communicative intention is obvious, however, is that so too is Congress's practical concern, namely, hiring discrimination against disabled persons capable of performing the job.

While courts must consider practical and communicative intentions in tandem, the two may still appear to conflict. What then? For a long while, a standard response was that courts should privilege Congress's practical intention. As John Manning describes, "[o]n the assumption that Congress legislates against the constraints of limited time, imperfect foresight, and imprecise human language," both scholars and jurists once reasoned that "when the plain import of a statutory text did not correspond to available evidence about the law's purposes, principles of legislative supremacy required judges to enforce the 'spirit' rather than the 'letter' of the law."<sup>85</sup> For the Supreme Court, this sort of traditional purposivism reached its apogee in the now infamous *Church of the Holy Trinity v. United States*.<sup>86</sup> In that case, the Court was asked whether a prohibition against contracting with an alien "to perform labor or service of any kind in the United States" applied to the hiring of a clergyperson to come to New York to serve as a minister.<sup>87</sup> The Court conceded that the language of the prohibition

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recognition of scrivener's errors commits one to a "baseline of legislative intent, for it is only against that baseline that it is possible to speak of legislative misspeaking").

<sup>82</sup> See, e.g., *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991) ("The best evidence of [the statute's] purpose is the statutory text adopted by both Houses of Congress and submitted to the President.").

<sup>83</sup> See Nelson, *supra* note 67, at 354 (observing that both textualists and purposivists "try[] to figure out 'what Congress meant by what it said'" when interpreting a statute (quoting *In re Sinclair*, 870 F.2d 1340, 1343 (7th Cir. 1989)); Doerfler, *supra* note 63, at 2–10.

<sup>84</sup> See *supra* note 72–74 and accompanying text.

<sup>85</sup> John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 113 [hereinafter Manning, *The New Purposivism*] (quoting *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892)).

<sup>86</sup> 143 U.S. 457.

<sup>87</sup> *Id.* at 458.

encompassed the hiring of the would-be minister.<sup>88</sup> Because, however, the apparent purpose of the prohibition was to prevent the influx of “cheap unskilled labor,” the Court held that the hiring of a “brain toiler” such as a clergyperson was nonetheless permitted.<sup>89</sup> “[H]owever broad the language of the statute may be,” the Court reasoned, “the act, although within the letter, is not within the [practical] intention of the legislature, and therefore cannot be within the statute.”<sup>90</sup>

That was then. Now, the consensus is that if Congress’s practical and communicative intentions appear to conflict, courts should privilege Congress’s communicative intention. As Manning observes, both textualists and “new” purposivists have come to recognize that Congress legislates means as well as ends.<sup>91</sup> In the words of Justice Stevens, “[s]tatutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main goal.”<sup>92</sup> As textualists have long argued, the best (and perhaps only) way for Congress to identify specific means is for it to use specific words.<sup>93</sup> Thus, if courts treat statutory text as a “proxy” for a law’s purpose, “they deny legislators the capacity, through their choice of words, to distinguish those statutes meant to embody specific . . . choices” with respect to means from those that reflect no such specification.<sup>94</sup> For all of these reasons, a broad majority of the Court now agrees that if “statutory language is clear, there is no need to reach . . . arguments based on statutory purpose,” at least in the absence of absurdity.<sup>95</sup> So, for example, if today Congress passed a statute saying, “No dogs in the park,” courts would not construe that statute as prohibiting

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<sup>88</sup> *Id.* (“It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other.”).

<sup>89</sup> *Id.* at 464–65. *But see* Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1837 (1998) (arguing that the Court relied upon a misreading of legislative history to reach this conclusion).

<sup>90</sup> *Holy Trinity*, 143 U.S. at 472.

<sup>91</sup> Here, Manning draws upon Max Radin’s distinction between “ulterior purposes,” i.e., a statute’s substantive ends, and “implemental purposes,” i.e., the means selected to bring about those ends. Manning, *The New Purposivism*, *supra* note 85, at 115 (citing Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930)).

<sup>92</sup> *Landgraf v. USI Film Prods.*, 511 U.S. 244, 286 (1994); *accord* *Wyeth v. Levine*, 555 U.S. 555, 601 (2009) (Thomas, J. concurring in the judgment) (“[A] statute’s text might reflect a compromise between parties who wanted to pursue a particular goal to different extents.”).

<sup>93</sup> *See* Manning, *The New Purposivism*, *supra* note 85, at 116.

<sup>94</sup> *Id.*

<sup>95</sup> *See* *Boyle v. United States*, 556 U.S. 938, 950 (2009) (Alito, J.); *see also* *Carr v. United States*, 560 U.S. 438, 458 (2010) (Sotomayor, J.) (“When the statutory language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.” (quoting *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006))).

110:811 (2016)

*The Scrivener's Error*

lions. No matter if the apparent mischief Congress seeks to remedy is the presence of dangerous animals.<sup>96</sup>

Go back now to the distinction between *meant* to say and *should* have said. In *Holy Trinity*, the Court set aside Congress's specific instruction because that instruction was, in the Court's view, attributable to Congress's limited foresight.<sup>97</sup> In other words, Congress would have said something different, the Court reasoned, had it taken into account certain *nonlinguistic* information. Specifically, had it thought about alien clergy, Congress would have carved out a clergy exception to the prohibition of alien labor.<sup>98</sup> As a faithful agent, the Court in turn carved out just such an exception on Congress's behalf. What we know today is that courts should hesitate to attribute Congress's specific instructions to, for example, limited foresight.<sup>99</sup> While it might seem at first glance that Congress *should* have said something other than what it did given its practical ends, it is just as plausible that what Congress said reflects a considered judgment as to implementation.<sup>100</sup>

Even still, if the current consensus is that courts must give effect to Congress's specific instructions, courts must, as a threshold matter, determine what specifically Congress instructs. And because Congress occasionally misspeaks, i.e., commits a scrivener's error, this will sometimes involve attributing to Congress specific communicative intentions that do not fit a "disquotational schema." In a disquotational schema, if one says, "*p*," one intends to communicate that *p*.<sup>101</sup> When, for example, Congress says, "It shall be unlawful for any person . . . who is a fugitive from justice . . . to . . . possess . . . [a] firearm,"<sup>102</sup> Congress intends

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<sup>96</sup> See Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 535–36, 546 (1983); Manning, *The New Purposivism*, *supra* note 85, at 116.

<sup>97</sup> 143 U.S. 457, 472 (1892) (characterizing this as a case in which "the legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, *unexpectedly*, it is developed that the general language thus employed is broad enough to reach cases and acts which . . . could not have been intentionally legislated against" (emphasis added)).

<sup>98</sup> See *id.* ("Suppose in the Congress that passed this act some member had offered a bill which in terms declared that, if any Roman Catholic church in this country should contract with Cardinal Manning to come to this country and enter into its service as pastor and priest . . . such contract should be adjudged unlawful and void, and the church making it be subject to prosecution and punishment, can it be believed that it would have received a minute of approving thought or a single vote?").

<sup>99</sup> See, e.g., *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 185 (1978) (refusing to carve out an exception to a broadly worded statute, reasoning that "[i]t is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated").

<sup>100</sup> As textualists have long observed, this is all the more apparent given the necessity of legislative compromise. See, e.g., Easterbrook, *supra* note 96, at 546–47.

<sup>101</sup> Cf. W.V. QUINE, *PHILOSOPHY OF LOGIC* (2d ed. 1986) (developing a disquotational theory of truth according to which, for example, the sentence "Snow is white" is true if and only if snow is white).

<sup>102</sup> 18 U.S.C. § 922(g) (2012).

to communicate that it shall be unlawful for any person who is a fugitive from justice to possess a firearm. Failure to fit a disquotational schema is most obvious in cases in which Congress misspeaks in a way that renders the sentence it utters ungrammatical. Thus, if Congress says, “No dogs in the parl,” courts do best to understand Congress as prohibiting dogs from the *park*. To treat the statute as a nullity—as would be the case if courts read the statute as prohibiting dogs from the *parl*, whatever that would mean—would plainly *not* be to give effect to Congress’s specific instruction. As indicated above, breakdowns of a disquotational schema, i.e., scrivener’s errors, are hardly limited to cases of ungrammaticality. Sometimes Congress says “insure” when it means to communicate *ensure*. In those cases, courts give effect to Congress’s specific instruction by attributing to Congress a misstatement. And that is just to say that, in those cases, courts do well, qua faithful agents, to say that what Congress *meant* to say was “ensure.”

### B. *The Absurdity Doctrine*

A remaining question is how scrivener’s errors relate to the “absurdity doctrine.”<sup>103</sup> Courts sometimes invoke language of “absurdity” when talking about scrivener’s errors.<sup>104</sup> Most notably, Justice Scalia appears to regard “absurdity” as a necessary condition for scrivener’s error recognition.<sup>105</sup> This association of scrivener’s errors and absurdity might seem worrisome; the absurdity doctrine is now looked upon with some skepticism.<sup>106</sup> As this Section explains, however, the reasons for skepticism

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<sup>103</sup> See generally Manning, *The Absurdity Doctrine*, *supra* note 8.

<sup>104</sup> See, e.g., *Owner–Operator Indep. Drivers Ass’n v. Landstar Sys., Inc.*, 622 F.3d 1307, 1327 (11th Cir. 2010) (“There is no reason for this Court to rewrite a statute because of an alleged scrivener error unless a literal interpretation would lead to an absurd result.”); *Owner–Operator Indep. Drivers Ass’n v. United Van Lines, LLC*, 556 F.3d 690, 694 (8th Cir. 2009) (“[A] narrow exception to the principle of rigid adherence to the plain meaning of a statute is the rare case of a ‘scrivener’s error’ that produces an ‘absurd result.’”).

<sup>105</sup> See *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 82 (1994) (Scalia, J., dissenting) (characterizing the scrivener’s error doctrine as “permit[ting] a court to give an unusual (though not unheard-of) meaning to a word which, if given its normal meaning, would produce an *absurd* and arguably unconstitutional result” (emphasis added)); *Union Bank v. Wolas*, 502 U.S. 151, 163 (1991) (Scalia, J., concurring) (“Since there was here no contention of a ‘scrivener’s error’ producing an *absurd* result, the plain text of the statute should have made this litigation unnecessary and unmaintainable.” (emphasis added)); see also ANTONIN SCALIA & BRIAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 238 (2012) (characterizing the recognition of a scrivener’s error as an application of the absurdity doctrine).

<sup>106</sup> See Manning, *The Absurdity Doctrine*, *supra* note 8, at 2459 n.265 (questioning whether the reasons that call into question the absurdity doctrine also call into question the recognition of scrivener’s errors); John C. Nagle, *Textualism’s Exceptions*, *ISSUES IN LEGAL SCHOLARSHIP*, Dec. 2002, art. 15, at 1–2 (arguing that textualists should refuse to recognize both “absurd results” and scrivener’s errors); see also Gold, *supra* note 9, at 28 (arguing that the absurdity doctrine and the scrivener’s error doctrine rest on the same normative foundation).

110:811 (2016)

*The Scrivener's Error*

of the absurdity doctrine have no bearing on the treatment of absurdity as evidence of *linguistic* error rather than as evidence of practical unwisdom.

Courts appeal to “absurdity” for different purposes. For that reason, the absurdity doctrine is somewhat loosely defined. Roughly speaking, the doctrine is that, if the application of a statute to a particular act would “lead[] to an absurd result,” the statute “must be so construed as to avoid the absurdity.”<sup>107</sup> This is because the absurdity of the application “makes it unreasonable to believe that the legislator intended to include [within the statute] the particular act.”<sup>108</sup>

As before, courts’ talk of “inten[tion]” here is ambiguous. Sometimes courts treat absurdity as evidence that some statutory application is contrary to Congress’s practical intention. In *Holy Trinity*, for example, the Court found it “absurd” that Congress would intend to exclude alien clergy given, among other things, that ours is “a religious nation.”<sup>109</sup> Again, the Court in that case conceded that exclusion of clergy was within the “letter” of the statute, i.e., within the statute’s linguistic meaning. Nonetheless, the Court treated the absurdity of the application to clergy as further evidence that Congress would have exempted clergy from the prohibition had it considered whether to do so.<sup>110</sup> Given its general commitment to promoting religion, Congress’s failure to exempt clergy was surely, in the Court’s view, the result of limited foresight.

Much more recently, in *Bond v. United States*, the Court held that a prohibition against the use of a “chemical weapon,” did not apply to the use of chemicals “toxic to humans and, in high enough doses, potentially lethal” in a domestic dispute where defendant did not intend to kill her victim, but instead hoped that her victim would touch the chemicals and “develop an uncomfortable rash.”<sup>111</sup> The statute defined “chemical weapon” as any “toxic chemical” not used for a “peaceful purpose.”<sup>112</sup> In turn, the statute defined “toxic chemical” as “any chemical [that] through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals.”<sup>113</sup> These broad definitions notwithstanding, the Court observed that, “[w]hen used in the manner here, the chemicals in this case are not of the sort that an ordinary person would

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<sup>107</sup> *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459–60 (1892).

<sup>108</sup> *Id.* at 459.

<sup>109</sup> *Id.* at 470.

<sup>110</sup> *See id.* at 472.

<sup>111</sup> 134 S. Ct. 2077, 2085 (discussing 18 U.S.C. § 229(a)(1) (2012)).

<sup>112</sup> § 229F(1)(A), (7)(A).

<sup>113</sup> *Id.* § 229F(8)(A).

associate with instruments of chemical warfare.”<sup>114</sup> The Court reasoned further that it was “reluctant to ignore the ordinary meaning of ‘chemical weapon’ when doing so would transform a statute passed to implement the international Convention on Chemical Weapons into one that also makes it a federal offense to poison goldfish.”<sup>115</sup> In other words, because Congress’s practical intention was to implement “a treaty about chemical warfare and terrorism,” not about “purely local crimes,”<sup>116</sup> application of the statute to the defendant and others similarly situated was simply beyond the pale. Unlike in *Holy Trinity*, the Court in *Bond* denied the defendant’s act was within the letter of the statute, declaring the statute “ambiguous.”<sup>117</sup> As the Court conceded, however, the statute was only “ambiguous,” in its view, *because* of the “improbably broad reach of the key statutory definition.”<sup>118</sup>

Other times, courts treat absurdity as evidence that an application is contrary to Congress’s communicative intention. In these cases, courts take the absurdity of some candidate interpretation as reason to reject it in favor of some other interpretation. So used, appeal to absurdity is a tool for resolving (as opposed to creating) ambiguity. As I have argued more fully elsewhere, courts do this all the time in “easy” cases, albeit unthinkingly. To use an earlier example, section 102(b) of the ADA makes it unlawful for an employer, when hiring, to discriminate against a “qualified individual” on the basis of that individual’s disability.<sup>119</sup> Courts read “qualified individual,” as used, as referring to an individual qualified for the position for which she applied. This is because alternate readings (e.g., an individual qualified to operate a motor vehicle, an individual qualified to vote) are absurd insofar as they are completely irrelevant to Congress’s apparent practical concern with employment discrimination against the disabled (e.g., what does qualification to operate a motor vehicle have to do with hiring decisions *generally*?).

As Manning has argued, to the extent that absurdity is treated as evidence that an application is contrary to Congress’s practical intention, a doctrine of rejecting “absurd” applications is just an instance of traditional

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<sup>114</sup> *Bond*, 134 S. Ct. at 2090.

<sup>115</sup> *Id.* at 2091.

<sup>116</sup> *Id.* at 2090.

<sup>117</sup> *See id.*

<sup>118</sup> *Id.*; *see also id.* at 2096 (Scalia, J., concurring in the judgment) (“Imagine what future courts can do with that judge-empowering principle: Whatever has improbably broad, deeply serious, and apparently unnecessary consequences . . . is *ambiguous*!”).

<sup>119</sup> *See supra* notes 72–74 and accompanying text.

110:811 (2016)

*The Scrivener's Error*

purposivism.<sup>120</sup> Thus, all the reasons for doubting traditional purposivism apply to the absurdity doctrine so applied.<sup>121</sup>

By contrast, to the extent that absurdity is treated as evidence that an interpretation conflicts with the communicative intention expressed by a statute, traditional purposivism is neither here nor there. As argued above, even if courts must give effect to Congress's specific instructions, judges still must determine what specifically Congress instructs. This means, among other things, sorting among candidate interpretations. And one sensible way to sort among candidate interpretations is to privilege non-absurd interpretations over interpretations that are absurd. Both textualists and purposivists accept that language has meaning only in context.<sup>122</sup> Both accept further that context consists in part of Congress's apparent practical ends.<sup>123</sup> Taken together, this suggests that, other things being equal, if a candidate interpretation (e.g., that "qualified individual" refers to an individual qualified to operate a motor vehicle) is absurd given Congress's practical ends (e.g., eliminating hiring discrimination against disabled persons capable of performing the job), one should reject that interpretation in favor of a linguistically plausible, nonabsurd interpretation (e.g., that "qualified individual" refers to an individual qualified for the position for which she applied).

Turn now to scrivener's errors. Courts sometimes treat the absurdity of what Congress said as evidence that Congress *meant* to say something else. In such cases, appeal to absurdity is of the benign, evidence-of-conflict-with-communicative-intention variety. To use an earlier example, if Congress's practical intention is to create a time limit for appeal, it is absurd for Congress to require parties to appeal "not *less* than 7 days" after the decision.<sup>124</sup> From this, a court will infer that Congress meant to say

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<sup>120</sup> See Manning, *The Absurdity Doctrine*, *supra* note 8, at 2485–86.

<sup>121</sup> As *Bond* illustrates, the Court's handling of cases involving prosecutorial overreach thus represents a notable exception to the shift away from traditional purposivism. See also *Yates v. United States*, No. 13-7451, slip op. at 20 (U.S. Feb. 25, 2015) (plurality opinion) (holding that the provision of the Sarbanes-Oxley Act prohibiting the destruction of any "tangible object" with the intent to obstruct a federal investigation did not apply to the destruction of undersized red grouper by a commercial fisherman attempting to avoid prosecution under federal conservation regulations).

<sup>122</sup> Compare *Auburn Hous. Auth. v. Martinez*, 277 F.3d 138, 144 (2d Cir. 2002) (Katzmann, J.) ("The meaning of a particular section in a statute can be understood in context with and by reference to the whole statutory scheme, by appreciating how sections relate to one another."), with *Concast, Inc. v. AMCA Sys., Inc.*, 959 F.2d 631, 632 (7th Cir. 1992) (Easterbrook, J.) ("Language is an unruly tool because meaning is contextual . . .").

<sup>123</sup> See *United States v. Tinklenberg*, 131 S. Ct. 2007, 2013 (2011) (Breyer, J.) ("[W]hen read in context and in light of the statute's structure and purpose, we think it clear that Congress intended [the provision] to apply automatically."); Manning, *Equity of the Statute*, *supra* note 65, at 17 (observing that "textualists will consult a statute's purpose to clarify an ambiguity").

<sup>124</sup> See *supra* notes 46–48 and accompanying text.



“more,” not “less.” Put slightly differently, a court will, in this case, consider two candidate interpretations (e.g., “less” means *less*; “less” means *more*). A court will then reject the absurd interpretation in favor of the interpretation that is not absurd. And on the basis of that non-absurd interpretation, a court will conclude that rejecting as untimely an appeal filed in, say, five days, is contrary to Congress’s communicative intention.

More generally, when asking whether some statutory provision contains a scrivener’s error, courts must resolve an ambiguity in Congress’s communicative intention. On the one hand, Congress might have meant to say what it said. On the other, it might have meant to say something else. If the former possibility is absurd, courts will reject it in favor of the latter. In such cases, Congress’s misstatement is thus “absolutely clear,” suggesting that courts’ talk of “absurdity” in the area of scrivener’s errors is simply a reflection of the current doctrine’s burden of proof. Regardless, in drawing such inferences, courts leverage Congress’s apparent practical intention to reveal Congress’s communicative intention. As discussed above, this is part and parcel of giving effect to Congress’s specific instructions.<sup>125</sup>

### III. WHEN TO RECOGNIZE A SCRIVENER’S ERROR?

So courts should recognize scrivener’s errors—but under what conditions? The prevailing view, both among courts<sup>126</sup> and scholars,<sup>127</sup> is that courts should recognize such an error if and only if the error is “absolutely clear.” The reason offered is, again, that if a court were to recognize a less clear error, it might be “rewriting” the statute at issue.

This should seem odd. Suppose that it is merely more likely than not that some statute contains a scrivener’s error. In that case, courts should,

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<sup>125</sup> *Contra* Spivey v. Vertrue, Inc., 528 F.3d 982, 984 (7th Cir. 2008) (Easterbrook, J.) (“That Congress has written a deadline imprecisely, or even perversely, is not a sufficient reason to disregard the enacted language. . . . Turning ‘less’ into ‘more’ would be a feat more closely associated with the mutating commandments on the barn’s wall in *Animal Farm* than with sincere interpretation.”). In this case, Judge Easterbrook goes on to express reasonable sympathy for the party who acted in accordance with what Congress said. *See id.* at 985. That concern, however, pertains more to the values of fair notice and lenity than to the nature of “sincere interpretation.” If, to use a previous example, one were to refuse to remove both of one’s shoes at airport security, insisting that the sign says, “Please remove your shoe,” one’s interpretation of that sign would be most *insincere*.

<sup>126</sup> *See, e.g.,* Owner–Operator Indep. Drivers Ass’n v. United Van Lines, LLC, 556 F.3d 690, 694 (8th Cir. 2009); Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc., 448 F.3d 1092, 1097–98 (9th Cir. 2006); United States *ex rel.* Holmes v. Consumer Ins. Grp., 318 F.3d 1199, 1209–10 (10th Cir. 2003); *In re* Jarvis, 53 F.3d 416, 419 (1st Cir. 1995). Prior to his retirement, Justice Stevens appeared to advocate for a more permissive scrivener’s error doctrine. *See, e.g.,* Pittston Coal Grp. v. Sebben, 488 U.S. 105, 129–31 (1988) (Stevens, J., dissenting) (criticizing the majority for failing to recognize a scrivener’s error in a regulation, characterizing his reading as “far more plausible” than the majority’s). No member of the current Court has taken up Justice Stevens’s cause.

<sup>127</sup> *See* Fried, *supra* note 10, at 614; Gold, *supra* note 9, at 28; Manning, *The Absurdity Doctrine*, *supra* note 8, at 2459 n.265; Ohlendorf, *supra* note 11, at 155.

110:811 (2016)

*The Scrivener's Error*

according to the prevailing view, ignore the likely error. Yet by ignoring the likely error, courts likely misinterpret—that is, “rewrite”—the statute at issue. After all, in so doing, courts act as if Congress’s communicative intention is something other than what it likely is.

What this simple example suggests is that courts should recognize a scrivener’s error if and only if the error is more likely than not. By recognizing all and only likely errors, courts likely get it right in each case. Put another way, to refuse to recognize errors that are merely likely out of caution is to ignore that both “false positives” and “false negatives” are interpretive mistakes.<sup>128</sup> If fidelity to Congress is the goal, courts should be much more open to the possibility of congressional misstatement.

#### *A. More Likely Than Not*

##### *1. Assumptions.*

*a. Equal cost of error.*—The permissive account just sketched assumes that, with respect to scrivener’s error, both false positives and false negatives are equally “costly.” In terms of correctness, this assumption is straightforward. For the reasons explained in Part II,<sup>129</sup> courts err both by recognizing “errors” that are not and by failing to recognize ones that are. Put another way, both false positives and false negatives are instances of misinterpretation. In terms of practical consequences,<sup>130</sup> the assumption of equal cost is based upon the principle of insufficient reason.<sup>131</sup> A priori, there is no reason to think that recognition of “errors” that are not is any more harmful than failure to recognize ones that are. Further, anecdotal evidence suggests that false negatives are potentially quite harmful.<sup>132</sup>

*b. Capacity to assess likelihood of error.*—The permissive account assumes further that courts can assess the likelihood that a statute contains a scrivener’s error. If courts were bad at assessing the likelihood of error, requiring them to act upon their subjective assessments would plausibly yield bad results. For example, if courts wildly overestimated the likelihood of error, they might do best to assume statutes contain no errors

<sup>128</sup> Cf. Frederick Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw*, 45 VAND. L. REV. 715, 732 (1992) (observing that an interpretive rule concerning “absurd” results must account for both “false positives,” i.e., “erroneous identifications of absurdity,” and “false negatives,” i.e., “erroneous nonidentifications of absurdity”).

<sup>129</sup> See *supra* Section II.A.

<sup>130</sup> To the extent that such consequences are relevant to rules of statutory interpretation.

<sup>131</sup> See ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 173–75 (2006) (observing that it is rational under certain circumstances to assume that unknown probabilities are equal).

<sup>132</sup> See, e.g., the discussion of *King v. Burwell* *infra* notes 160–10 and accompanying text.

unless clear.<sup>133</sup> More modestly, if the reliability of such assessments were unknown, courts would plausibly do best not to consider whether statutes contain less-than-clear errors to minimize judicial decision costs.<sup>134</sup> Why devote time and effort to the search if it might be futile? Helpfully, there is every reason to believe that this assumption is true—that courts *can* assess the likelihood that a statute contains an error. This is because making such assessments involves only the exercise of basic linguistic competency. It is a feature of ordinary conversation that speakers misspeak on occasion. Listeners are, in turn, adept at identifying mistakes of expression. To identify mistakes of expression in statutes, no additional skills are required.<sup>135</sup> As in ordinary conversation, the listener (here, courts) can infer, on the basis of context, whether the speaker (here, Congress) meant to say something other than what she did.<sup>136</sup> Thus, as competent language users, courts should be quite good at identifying misexpressions.<sup>137</sup> In this respect, identifying scrivener's errors is quite unlike, say, parsing legislative history, an area in which judicial competency is questionable at best.<sup>138</sup>

## 2. *Objections.*

*a. Increased decision costs.*—The permissive account is subject to at least three objections. First, one might object that the benefits of identifying additional scrivener's errors are outweighed by the corresponding increase in *judicial decision* costs. Suppose, for example,

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<sup>133</sup> Assuming the degree of overestimation exceeds the degree of underestimation that results from the current doctrine.

<sup>134</sup> See VERMEULE, *supra* note 131, at 192 (observing that it may be rational to forgo consideration of some types of information if the epistemic utility of considering such information is unknown and the utility of considering some other type of available information is known).

<sup>135</sup> Identifying mistakes in statutes perhaps requires specific familiarity with statutes, much in the same way that identifying mistakes in instruction manuals perhaps requires specific familiarity with instruction manuals. Needless to say, judges have more than a passing familiarity with the statutory form.

<sup>136</sup> As Andrei Marmor argues, it is possible that context is less informationally rich in the legislative context than in the ordinary conversational context. See Marmor, *supra* note 80, at 434–35. Be that as it may, speakers are adept at drawing the inferences one reasonably can on the basis of what information is available.

<sup>137</sup> Indeed, to the extent that the object of inquiry is Congress's "objectified" intent, courts, as competent, appropriately informed listeners, are correct in their assessments by definition. See, e.g., Manning, *Legislative Intent*, *supra* note 67, at 424 (defining "objectified intent" as "the import that a reasonable person conversant with applicable social and linguistic conventions would attach to the enacted words"); Doerfler, *supra* note 63, at 26–30.

<sup>138</sup> See, e.g., ROBERT A. KATZMANN, JUDGING STATUTES 49 (2014) ("The paucity of judicial knowledge about congressional rules and processes relating to the legislative process... is striking..."); VERMEULE, *supra* note 131, at 107–15 (cataloging reasons to question judicial competency in evaluating legislative history); Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 85 (2012) (lamenting judicial "ignorance of how Congress works").

110:811 (2016)

*The Scrivener's Error*

that scrivener's errors are both rare and practically insignificant. Based on that supposition, one might infer that the search for nonobvious errors is not, or at least is not obviously, worth the cost. That inference, however, would be mistaken. As discussed above, identifying scrivener's errors is just part of ordinary interpretation. When confronted with statutory text, courts must determine what Congress means. This involves sorting among candidate interpretations. And among those candidate interpretations will be ones that do not fit a disquotational schema. Courts accept or reject nondisquotational interpretations by considering the same information (e.g., text, structure) and by exercising the same linguistic capacities they use when accepting or rejecting any other. In this way, the search for scrivener's errors, obvious or not, does not require courts to do anything they are not already doing.<sup>139</sup> If a court opts to interpret some statutory provision, the marginal decision cost of searching for likely scrivener's errors is thus minimal. Here, again, searching for scrivener's errors contrasts sharply with considering legislative history, where additional decision costs are plausibly high.<sup>140</sup>

It is true that under a more permissive scrivener's error doctrine, courts likely would have (marginally<sup>141</sup>) more statutory provisions to interpret. It is doubtful, however, that this increase in judicial workload would be a bad thing. Under a more permissive doctrine, the set of meritorious scrivener's error arguments (e.g., errors that are more likely than not) would be larger than under the current doctrine (e.g., errors that are "absolutely clear"). And some of those newly meritorious claims would presumably require courts to interpret provisions they would otherwise not. Those new claims, however, are ones that courts should want to hear. Under the current doctrine, the set of provisions implicated by those newly meritorious claims are assumed to contain no errors. Because those new claims only implicate errors that are more likely than not, this assumption is, by definition, probably wrong. The new claims provide courts an opportunity to correct this likely mistake. As illustrated by the figure below, all cases falling between "very likely" and "somewhat likely" probably come out incorrectly under the current doctrine, assuming courts apply the doctrine faithfully. Subject to that same assumption (more on this

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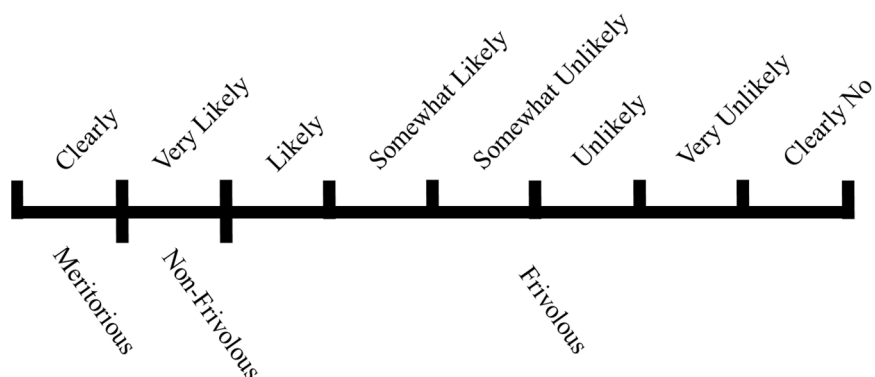
<sup>139</sup> Relatedly, it is worth mentioning here that there is no reason to believe that sorting "somewhat likely" errors from "somewhat unlikely" ones is any more difficult—and, hence, any more costly—than sorting "absolutely clear" errors from "very likely" ones.

<sup>140</sup> See VERMEULE, *supra* note 131, at 194 (noting "very high decision costs" involved in consulting legislative history).

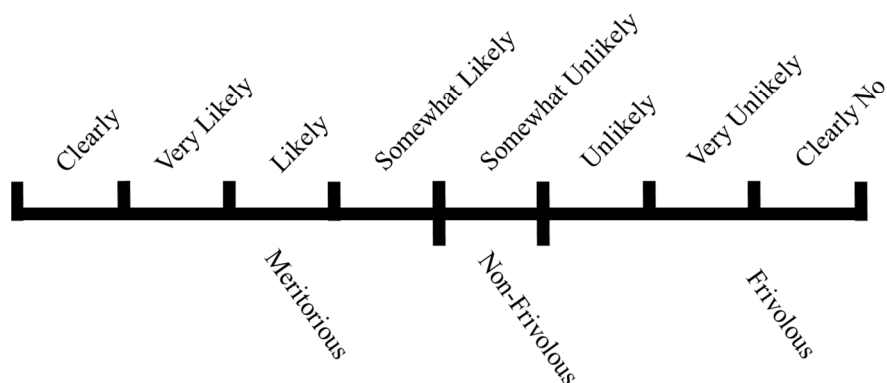
<sup>141</sup> Given the general infrequency of scrivener's errors, any increase in workload is likely to be modest.

below<sup>142</sup>), those cases likely come out correctly under the more permissive doctrine recommended here.

### Current Doctrine



### Permissive Doctrine



More worrisome, under a more permissive doctrine, claims that were previously frivolous (e.g., errors that are somewhat unlikely) would be nonmeritorious but nonfrivolous. But there is no reason to think that the set of nonmeritorious but nonfrivolous claims would be any larger under a more permissive doctrine than under the current doctrine, i.e., that the set of errors that are somewhat unlikely is substantially larger than the set of

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<sup>142</sup> See *infra* note 153 and accompanying text.

110:811 (2016)

*The Scrivener's Error*

errors that are very likely.<sup>143</sup> One should thus assume that the frequency with which courts will have their time wasted would be roughly the same under both.<sup>144</sup>

Go back now to the initial supposition of infrequency and insignificance. Most statutory provisions do not contain scrivener's errors.<sup>145</sup> There is, however, reason to believe that scrivener's errors—at least of a certain sort—occur with greater frequency under contemporary legislative conditions. Contemporary statutes are enormous and complex, containing countless interdependent provisions and cross-references. In part, this is a function of subject matter. The United States healthcare system, for example, is hugely complicated; it is thus unsurprising that comprehensive healthcare legislation requires hundreds of pages in the United States Code.<sup>146</sup> In part, it is also a function of the contemporary legislative process: as political scientist Barbara Sinclair has famously documented, so-called unorthodox lawmaking, i.e., lawmaking outside of the traditional committee process, is increasingly common.<sup>147</sup> Among other things, this includes increased use of omnibus legislation, which addresses numerous, often unrelated subject matters within a single bill. Given the size and complexity of contemporary statutes, it should come as no surprise that Congress does not catch every error. The risk may be particularly high for errors that result in cases of incomplete amendment—that is, unintended mismatches between one provision and another.<sup>148</sup>

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<sup>143</sup> Given the general infrequency of scrivener's errors, one suspects that there is clearly or, perhaps, very likely no scrivener's error in the vast majority of cases. How the cases are distributed beyond that, however, is difficult to say without significant empirical inquiry.

<sup>144</sup> More still, even if there are, for some unspecified reason, more "somewhat unlikely" errors than there are "very likely" errors, the difference would have to be substantial for the increase in decision cost to offset the accuracy gains that would result from the more permissive approach.

<sup>145</sup> Just as most police encounters do not involve brutality and most purchases are not the product of consumer fraud.

<sup>146</sup> See Paul Clement, *The Patient Protection and Affordable Care Act and the Breadth and Depth of Federal Power*, 35 HARV. J.L. & PUB. POL'Y 887, 887 (2012) ("[T]his Act is hundreds of pages long."). And tens of thousands of pages in the Federal Register to implement that legislation. See Joseph Friedman et al., *A Crystal Ball: Managed Care Litigation in Light of the Patient Protection and Affordable Care Act*, HEALTH LAW., Dec. 2014, at 1, 1.

<sup>147</sup> See BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS (4th ed. 2012).

<sup>148</sup> As Jarrod Shobe observes, the legislative drafting process has become increasingly professionalized over the last several decades, with, among other things, increasing reliance on professional drafters in the form of legislative counsel. Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807, 826–31 (2014). As Shobe suggests, this increasing reliance on legislative counsel to craft precise wording plausibly reduces the number of scrivener's errors at the level of the individual word or sentence, see *id.* at 875, even as an increasingly complex legislative process makes other, more structural kinds of scrivener's errors (e.g., incomplete amendments). When combined with the complicated nature of both

*b. Increased judicial willfulness or motivated reasoning.*—Second, one might object that a more permissive scrivener’s error doctrine would invite judicial “willfulness” or “motivated reasoning,” thereby negating any gains in terms of correctness, i.e., fidelity to legislative intent. A standard justification for rigid interpretive rules is that they limit judicial discretion, preventing judges from substituting their political preferences for those of the politically accountable legislature.<sup>149</sup> The concern here is that if courts are permitted to recognize scrivener’s errors that are merely likely, then judges with strong policy preferences of their own will start to see “likely” errors where there are none. The current scrivener’s error doctrine, this line of reasoning concludes, thus operates as a bulwark against judicial willfulness or motivated reasoning.

The concern about increased willfulness or motivated reasoning suffers from roughly the same defect as the “rewriting” concern that motivates the current, restrictive doctrine. Just as the concern about “rewriting” ignores that courts can misinterpret in either direction, the concern about increased willfulness or motivated reasoning ignores that courts can be biased in either direction. To elaborate, for the sake of argument, that courts can mischaracterize slightly the probability of an interpretation without reputational cost (e.g., that courts can, without embarrassment, characterize a somewhat unlikely interpretation as “likely” or a merely likely interpretation as “very likely”). In that case, lowering the burden of proof for a scrivener’s error would make it *easier* for motivated courts to recognize errors where probably there are none (e.g., courts could recognize errors that are somewhat unlikely by mischaracterizing them as “likely”). At the same time, lowering the burden of proof would also, and to the same degree, make it *more difficult* for motivated courts to refuse to recognize errors where errors probably exist (e.g., courts could no longer refuse to recognize errors that are clear by mischaracterizing them as “very likely”). There is no a priori reason to think that the policy preferences of courts are advanced more often by imagining errors than by turning a blind eye to actual ones. Nor is there any reason a priori to think that there are, say, more somewhat unlikely errors that could be mischaracterized as

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contemporary statutes and the contemporary lawmaking process, this suggests scrivener’s errors fall increasingly into the category of incomplete amendment, as opposed to, say, slip of the tongue.

<sup>149</sup> See, e.g., Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 544 (1988) (arguing that “formalism disables some decisionmakers from considering some factors that may appear important to them,” and so “achieves its value when it is thought desirable to narrow the decisional opportunities and the decisional range of a certain class of decisionmakers”); Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 638 (1999) (observing that “formalism” involves a commitment to “constraining the discretion of judges in deciding cases”).

110:811 (2016)

*The Scrivener's Error*

“somewhat likely” than, say, clear errors that could be mischaracterized as merely “very likely.” There is thus no reason to think that the current doctrine protects any better against willfulness or motivated reasoning than would a doctrine requiring error recognition if and only if error is more likely than not.

In terms of comparative accuracy, the superiority of the permissive over the restrictive doctrine thus turns out *not* to hinge on the assumption that courts apply each doctrine faithfully. To illustrate using the earlier figure, assume that courts can successfully mischaracterize a possible error by one degree of probability (e.g., that courts can mischaracterize a “likely” error as either “very likely” or “somewhat likely”). Under that assumption, the best-case scenario for the restrictive approach is that courts systematically overestimate the likelihood of error, mischaracterizing all “very likely” errors as “absolutely clear.” In that scenario, courts still likely reach the incorrect outcome—a false negative—in cases ranging from “likely” to “somewhat likely.” By contrast, the worst-case scenario for the permissive approach is that courts systematically underestimate the likelihood of error, misconstruing all “somewhat unlikely” errors as “somewhat likely.” In that scenario, courts likely reach the incorrect outcome—a false positive—in those “somewhat unlikely” cases. A priori, there is no reason to believe that there are more “somewhat unlikely” errors than there are “somewhat likely” errors, let alone “somewhat likely” and “likely” errors combined. Therefore, even in improbably unfavorable scenarios, adherence to the proposed permissive doctrine results in greater accuracy than does adherence to the current restrictive one.

*c. Increased congressional misconduct.*—Last, one might object that the benefits of a more permissive doctrine would be negated by a resulting increase in congressional misconduct. Another argument for rigid interpretive rules generally is that they compel Congress to draft more carefully.<sup>150</sup> One might thus argue that adherence to a more permissive scrivener’s error doctrine would only produce more scrivener’s errors since

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<sup>150</sup> See, e.g., SCALIA & GARNER, *supra* note 105, at 51 (“The canons . . . promote clearer drafting.”); Sunstein, *supra* note 65, at 424 (noting the argument that adherence to “plain meaning” “warn[s] the lawmakers to be careful about statutory language”); cf. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 57–65 (1999) (arguing that the promise of judicial review may promote legislative irresponsibility and distort legislative deliberation); James B. Thayer, *Constitutionality of Legislation: The Precise Question for a Court*, 38 NATION 314, 315 (1884) (“It is a common saying in our legislative bodies when any constitutional point is raised, ‘Oh, the courts will set that right’ . . .”).



Congress would expect courts to correct its mistakes.<sup>151</sup> The problem with this type of argument is that, as an empirical matter, Congress is increasingly unresponsive to judicial “discipline.”<sup>152</sup> In a recent study, for example, Richard Hasen finds a sharp drop-off of congressional overrides of Supreme Court statutory interpretation decisions since the 1990s.<sup>153</sup> Hasen attributes the decrease in large part to a corresponding increase in political polarization within Congress.<sup>154</sup> As Hasen observes, “[i]n a highly polarized atmosphere and with Senate rules usually requiring sixty votes to change the status quo, the Court’s word on the meaning of statutes is now final almost as often as its word on constitutional interpretation.”<sup>155</sup> Hasen’s observation is consistent with more general findings by political scientists that increased congressional polarization has resulted in unprecedented levels of partisan gridlock.<sup>156</sup> Add to this survey results from Abbe Gluck and Lisa Bressman suggesting that participants in the legislative drafting process are largely insensitive to judicial interpretive rules, and the disciplining argument looks weaker still.<sup>157</sup> On the other side of the ledger, the Court’s increased attention to text in recent decades has corresponded to increased professionalization of legislative drafting process, and, in turn, increased attention to text on the part of legislative drafters.<sup>158</sup> There, however, causation plausibly runs in the other direction, with increased

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<sup>151</sup> See Nelson, *supra* note 67, at 381–82 (“[T]he courts’ reluctance to identify and correct ‘drafting errors’ may encourage members of Congress or their staffs to spend more time proofreading and poring over each individual bill.”).

<sup>152</sup> Nourse, *supra* note 138, at 138–41 (calling this the “Let’s Discipline Congress” argument).

<sup>153</sup> See Hasen, *supra* note 25, at 209; accord Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1319 (2014) (finding a similar drop-off beginning with the 106th Congress in 1999).

<sup>154</sup> See Hasen, *supra* note 25, at 209 (observing that “partisanship seems to have strongly diminished the opportunities for bipartisan overrides of Supreme Court cases”); see also Christiansen & Eskridge, Jr., *supra* note 153, at 1332 (observing that the drop-off followed immediately President Clinton’s House impeachment and Senate trial in 1998).

<sup>155</sup> Hasen, *supra* note 25, at 209.

<sup>156</sup> See, e.g., Binder, *supra* note 23, at 97 (observing that “levels of legislative deadlock have steadily risen over the past half century” with “[s]talemate at times now reach[ing] across three-quarters of the salient issues on Washington’s agenda”).

<sup>157</sup> See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 932–37 (2013) (finding that drafters disregard, for example, the rule against superfluities, the presumption of consistent usage, and the consideration of dictionary definitions, and noting that such findings “run[] contrary to popular arguments that a strict textual approach may incentivize Congress to draft more carefully”).

<sup>158</sup> See Shobe, *supra* note 148, at 820–34 (observing increasing reliance by Congress on legislative counsel).

110:811 (2016)

*The Scrivener's Error*

professionalization making careful attention to text a much more defensible judicial methodological approach.<sup>159</sup>

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In sum, the simple, permissive account proposed here is that courts recognize scrivener's errors if and only if an error is more likely than not. In so doing, courts minimize interpretive mistake. As discussed above, the case for the permissive account rests on various assumptions. Each of those assumptions is, however, thoroughly supported. Some arguments in support—bidirectional willfulness, congressional indifference—are generic, applying with equal force against different formalist doctrines. Others—judicial competence, minimal decision costs—are specific to scrivener's errors. In combination, these arguments, if nothing else, place the burden of justification on the proponent of the more restrictive doctrine. Something other than a fear of rewriting is owed to justify deviation from a more-likely-than-not baseline.

#### *B. Distorted Argumentation*

In addition to interpretive mistake, the current scrivener's error doctrine promotes distorted argumentation. Because courts cannot correct even a very likely scrivener's error, the doctrine forces litigants to advance, and courts to adopt as precedent, deeply distorted interpretive rationales on pains of reaching the wrong outcome in a given case. This sort of distortion was on full display in the Supreme Court's decision in *King v. Burwell*, which involved a challenge to an Internal Revenue Service (IRS) rule interpreting the insurance subsidies provision of the PPACA. Such distortion is likely to feature in prominent cases going forward, as opponents of ambitious executive action search for defects in the enormous and complex statutes upon which such action relies.

*I. King v. Burwell.*—In March 2010, after protracted negotiations, Congress enacted the PPACA.<sup>160</sup> Among other things, the PPACA implements a trio of interdependent reforms, the purpose of which is to induce those ineligible for coverage from either the government or an employer to purchase health insurance on the individual market. First, the

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<sup>159</sup> See *id.* at 853 (arguing that “[t]extualism rose in prominence during [the 1980s through the 1990s] because statutes became clearer and more detailed due to Congress’s increased institutional capacity”); see also *id.* at 844 & tbl.3 (observing a dramatic increase in legislative staff between 1970 and 1980).

<sup>160</sup> Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S.C.).

Act prohibits insurers from denying coverage or increasing premiums on the basis of preexisting conditions (community rating).<sup>161</sup> Second, it imposes a tax penalty on nonexempt individuals who fail to maintain coverage (individual mandate).<sup>162</sup> Third, it provides subsidies in the form of tax credits for the purchase of insurance by low-income persons (subsidies).<sup>163</sup> On the one hand, community rating and subsidies make insurance affordable for all by ensuring a price not in excess of a reasonable percentage of income. On the other, the individual mandate makes the provision of affordable insurance financially feasible for insurers by ensuring a broad risk pool.

To further facilitate the purchase of insurance by individuals and small businesses, the PPACA creates state-specific marketplaces, known as “Exchanges,” on which customers can compare and purchase policies. Under section 1311 of the Act, “[e]ach State shall . . . establish an [Exchange] for the State.”<sup>164</sup> Because, however, Congress cannot require states to implement federal laws,<sup>165</sup> if a state refuses or is unable to set up an Exchange, section 1321 of the Act provides that the federal government, through the Secretary of Health and Human Services (HHS), “shall . . . establish and operate such Exchange within the State.”<sup>166</sup>

Exchanges are also the mechanism through which the Act makes subsidies available to those eligible. More specifically, § 36B of the Internal Revenue Code (IRC), enacted as part of the PPACA, makes available tax credits for persons who purchase health insurance “through an Exchange established by the State under [Section] 1311 of the [Act].”<sup>167</sup>

In May 2012, the IRS issued a final rule interpreting § 36B as authorizing the agency to grant tax credits to persons who purchased insurance through either a state-run or a federally facilitated Exchange.<sup>168</sup> Shortly thereafter, opponents of the PPACA challenged the rule, arguing that it was invalid because, according to its plain language, § 36B authorizes subsidies for insurance purchased through state-run Exchanges alone.<sup>169</sup> At the time, thirty-four states relied upon federally facilitated

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<sup>161</sup> 42 U.S.C. § 300gg (2012).

<sup>162</sup> 26 U.S.C. § 5000A (2012).

<sup>163</sup> *Id.* § 36B.

<sup>164</sup> 42 U.S.C. § 18031(b)(1).

<sup>165</sup> *See* *Printz v. United States*, 521 U.S. 898, 935 (1997).

<sup>166</sup> 42 U.S.C. § 18041(c)(1).

<sup>167</sup> 26 U.S.C. § 36B(b)(2)(A) (footnote omitted).

<sup>168</sup> Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377 (May 23, 2012) (codified at 26 C.F.R. § 1.36B-2; 45 C.F.R. § 155.20).

<sup>169</sup> This argument appears to have been articulated first by Jonathan Adler, a legal academic, and Michael Cannon, a health policy expert at the Cato Institute. *See* Jonathan H. Adler & Michael F.

110:811 (2016)

*The Scrivener's Error*

Exchanges.<sup>170</sup> In 2014, more than five million people purchased insurance through such an Exchange, with the vast majority relying upon subsidies.<sup>171</sup> Hence, if the challenge were to succeed (and Congress and states were to stand pat), millions of Americans would suddenly be unable to afford health insurance.<sup>172</sup> For that reason, the vast majority of those Americans would become exempt from the individual mandate.<sup>173</sup> Under these conditions, the individual mandate would plausibly fail to produce a broad enough risk pool to avoid adverse selection, thus resulting in “death spirals” as premiums skyrocket.<sup>174</sup>

As word of the challenge spread, the press quickly characterized the dispute as involving a possible “typo.”<sup>175</sup> According to the *Washington Post*, for example:

The debate now centers on whether [§ 36B] has a drafting error. Did the federal government mean to count federally-established marketplaces there and miss a word? Or did they actually mean to send insurance subsidies only to states that did the heavy lifting?<sup>176</sup>

In other words, according to the press, the question was whether § 36B contains a scrivener’s error. Did Congress *intend* to limit subsidies to insurance purchased only through state-run Exchanges? Or is it just that Congress meant to say, “established by the State under section 1311 *or by the Secretary under section 1321*”?

There is, at least, a colorable argument that Congress meant to say what it said. As opponents of the law observe, the House initially enacted a bill under which the federal government would create a national Exchange,

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Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA*, 23 HEALTH MATRIX 119, 123 (2013).

<sup>170</sup> King v. Burwell, No. 14-114, slip op. at 6 (U.S. June 25, 2015).

<sup>171</sup> See Timothy Stoltzfus Jost, *Subsidies and the Survival of the ACA—Divided Decisions on Premium Tax Credits*, 371 NEW ENG. J. MED. 890, 891 (2014).

<sup>172</sup> *Id.*; King, slip op. at 4–5.

<sup>173</sup> King, slip op. at 5 (“[W]ithout the tax credits, the cost of buying insurance would exceed eight percent of income for a large number of individuals, which would exempt them from the coverage requirement.”).

<sup>174</sup> See *id.* at 13–15.

<sup>175</sup> Paul Krugman, *Death by Typo: The Latest Frivolous Attack on Obamacare*, N.Y. TIMES (Nov. 9, 2014), <http://www.nytimes.com/2014/11/10/opinion/paul-krugman-the-latest-frivolous-attack-on-obamacare.html> [http://perma.cc/8LD2-MGKD].

<sup>176</sup> Sarah Kliff, *Could One Word Take Down Obamacare?*, WASH. POST: WONKBLOG (July 16, 2012), <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/07/16/could-a-missing-word-take-down-obamacare/> [http://perma.cc/JH3X-8V2A]; see also Robert Pear, *Brawling Over Health Care Moves to Rules on Exchanges*, N.Y. TIMES (July 7, 2012), <http://www.nytimes.com/2012/07/08/us/critics-of-health-care-law-prepare-to-battle-over-insurance-exchange-subsidies.html> [http://perma.cc/8FC3-J4LM] (quoting health policy expert Timothy S. Jost as saying that “Congress had made ‘a drafting error’ that should be obvious to anyone who understands the new health care law”).

though providing states the option to establish their own. This approach proved untenable in the Senate, which, opponents allege, insisted on greater incentive for state participation.<sup>177</sup> Hence, opponents continue, Congress ultimately “used a variety of ‘carrots’ and ‘sticks’ to induce states to establish Exchanges voluntarily,”<sup>178</sup> including, for example, federal grants to states for “activities . . . related to establishing an [Exchange],”<sup>179</sup> and, opponents allege, a prohibition against restricting eligibility for state Medicaid programs until “an Exchange established by the State under section [1311] of [the Act] is fully operational.”<sup>180</sup> Most important, opponents insist, Congress conditioned federal subsidies on a state’s establishing and operating an Exchange, believing this to be an offer states could not refuse.<sup>181</sup>

Again, the above argument is colorable. For that reason, the restrictive reading of § 36B is not “absurd”—in other words, this is not an “absolutely clear” case of scrivener’s error. It is, however, unlikely for reasons Chief Justice Roberts, writing for the majority in *King*, observed. First, subsidies are, as discussed above, one “leg” of the “three-legged stool.”<sup>182</sup> It is doubtful that Congress would intend that the stool collapse in a state if that state failed to establish an Exchange.<sup>183</sup> Withholding federal funds is one thing. Setting off death spirals is another. Second, opponents’ reading of § 36B would give rise to various anomalies. Among other things, the Act would thus require the creation of federally facilitated Exchanges on which there would be no “qualified individuals” eligible to shop,<sup>184</sup> as well as the

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<sup>177</sup> While opponents frame the argument in terms of Congress’s actual, historical intent, *see infra* notes 178–81 and accompanying text, the argument can be translated for the most part into one having to do with objectified intent. *See supra* note 67.

<sup>178</sup> Brief for Petitioners at 2, *King v. Burwell*, No. 14-114 (U.S. June 25, 2015), 2014 WL 7386999, at \*2.

<sup>179</sup> 42 U.S.C. § 18031(a)(3) (2012).

<sup>180</sup> *Id.* § 1396a(gg)(1). This argument is to some degree circular since it assumes that the phrase “established by the State under section 1311” should be attributed the same significance as opponents urge in the context of § 36B. In other words, the argument assumes not only that the phrase should be interpreted the same way in both contexts, but also that theirs is the interpretation that should prevail.

<sup>181</sup> *King*, slip op. at 18 (quoting Brief for Petitioners, *supra* note 178, at 36). Opponents urge that states might not have refused had the IRS not issued the rule it did, thereby eliminating the incentive to accept. *Id.*

<sup>182</sup> *E.g.*, Jonathan Gruber, *Health Care Reform Is a “Three-Legged Stool”: The Costs of Partially Repealing the Affordable Care Act*, CTR. FOR AM. PROGRESS (Aug. 5, 2010), <https://www.americanprogress.org/issues/healthcare/report/2010/08/05/8226/health-care-reform-is-a-three-legged-stool/> [<https://perma.cc/WY5U-JXN3>]; *see also King*, slip op. at 1 (characterizing the reforms as “interlocking”).

<sup>183</sup> *See King*, slip op. at 15 (“[P]etitioners’ interpretation . . . would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very ‘death spirals’ that Congress designed the Act to avoid.”).

<sup>184</sup> *Id.* at 10 (quoting 42 U.S.C. §§ 18031(d)(2)(A), 18032(f)(1)(A)).

110:811 (2016)

*The Scrivener's Error*

reporting of information for a “[r]econciliation” of tax credits that could never occur.<sup>185</sup> For these reasons, it is all too likely that the restriction of subsidies to insurance purchased on an Exchange “established by the State under section 1311” was accidental, not intentional.<sup>186</sup> Specifically, it appears that § 36B, along with other portions of the Act,<sup>187</sup> were drafted on the assumption that the PPACA would provide *only* for state-run exchanges.<sup>188</sup> Later, the Act was amended to allow for federally facilitated exchanges as a fallback.<sup>189</sup> That edit, however, was implemented only partially despite its being intended to have global effect. In other words, it appears that the absence of a reference to exchanges “established by the Secretary” is an instance of incomplete amendment.

Regardless, because the restrictive reading of § 36B is not “absurd,” that § 36B contains a scrivener’s error is not “absolutely clear.” As Justice Scalia emphasized in dissent, a scrivener’s error argument was thus unavailable to the Government or supporting amici under the current doctrine.<sup>190</sup> This left both to pursue other, less plausible strategies.<sup>191</sup> The

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<sup>185</sup> *Id.* at 13–14 (quoting 26 U.S.C. § 36B(f)(3)).

<sup>186</sup> Further, to the extent that actual, historical intent matters, it appears that participants in the drafting process were utterly unaware of “any distinction between federal and state exchanges in terms of the availability of subsidies.” Robert Pear, *Four Words That Imperil Health Care Law Were All a Mistake*, *Writers Now Say*, N.Y. TIMES (May 25, 2015), <http://www.nytimes.com/2015/05/26/us/politics/contested-words-in-affordable-care-act-may-have-been-left-by-mistake.html> [<http://perma.cc/VS44-TBQM>] (quoting former Senator Olympia J. Snowe (R-ME)). “Some described the [language of § 36B] as ‘inadvertent,’ ‘inartful’ or ‘a drafting error.’” *Id.*

In support of their “carrots” and “sticks” argument, opponents insist that certain swing voters, in particular Senator Ben Nelson (R-NE), *did* intend that federal and state exchanges be treated different. See Brief for Petitioners, *supra* note 178, at 4 (citing Carrie Budoff Brown, *Nelson: National Exchange a Dealbreaker*, POLITICO: LIVE PULSE (Jan. 25, 2010), [http://www.politico.com/livepulse/0110/Nelson\\_National\\_exchange\\_a\\_dealbreaker.html](http://www.politico.com/livepulse/0110/Nelson_National_exchange_a_dealbreaker.html) [<http://perma.cc/T6HF-KSFN>]). Opponents cite Senator Nelson’s opposition to a *national* exchange, inferring from this opposition a commitment to “keep[ing] the federal government *out* of the process,” and, in turn, to providing “serious incentives to induce . . . state participation.” *Id.* The problem with opponents’ inference is that, on any reading, the PPACA is consistent with Senator Nelson’s opposition to a national exchange, authorizing only the creation of *state-specific* federally facilitated exchanges. See 42 U.S.C. § 18041(c)(1).

<sup>187</sup> See, e.g., 42 U.S.C. § 300gg-91(d)(21) (defining “Exchange” as a healthcare exchange “established under section [1311] of this [Act]”).

<sup>188</sup> Here the most direct evidence is the compulsory language of § 1311. See 42 U.S.C. § 18031(b)(1) (providing that “[e]ach State *shall* . . . establish an [Exchange] for the State” (emphasis added)).

<sup>189</sup> Perhaps upon recognizing that the Supreme Court’s anticommandeering doctrine prevents Congress from compelling a state to establish an exchange. See *Printz v. United States*, 521 U.S. 898, 933 (1997).

<sup>190</sup> See *King*, slip op. at 17 (Scalia, J., dissenting) (“But § 36B does not come remotely close to satisfying that demanding standard. It is entirely plausible that tax credits were restricted to state Exchanges deliberately—for example, in order to encourage States to establish their own Exchanges. We therefore have no authority to dismiss the terms of the law as a drafting fumble.”).

<sup>191</sup> Once this strategic reality became apparent, the press promptly corrected course. See, e.g., Elizabeth B. Wydra, *Five Myths About King v. Burwell*, WASH. POST (Feb. 26, 2015),

Government and some amici, for example, argued that, as used, the phrase “‘Exchange established by the State under section 1311’ is a term of art” that includes federally facilitated Exchanges.<sup>192</sup> Again, under section 1321, if a state fails to establish the “required Exchange,” the Secretary must “establish and operate *such Exchange* within the State.”<sup>193</sup> From this, the Government and amici inferred that the Secretary acts as a state’s “statutory surrogate” in establishing an Exchange, and so that an Exchange established by the Secretary just is an “Exchange established by the State under Section [1311].”<sup>194</sup> Perhaps. Suppose, however, that Ann instructs Beth to purchase a blueberry pie from Hi-Rise Bakery but instructs Carl to purchase “such pie” from Petsi Pies if Beth fails. If Carl goes on to purchase “such pie,” is that pie “purchased by Beth”? Is it also “from Hi-Rise”? Doubtful.<sup>195</sup>

Other supporting amici argued in addition that the restrictive reading of § 36B should be rejected for reasons of federalism.<sup>196</sup> Under *Gregory v. Ashcroft*, federal courts must “be certain of Congress’[s] intent before finding that federal law overrides” “the usual constitutional balance of federal and state powers.”<sup>197</sup> According to these other amici, reading § 36B restrictively would run afoul of the principle since, on that reading, Congress “buried” the condition on subsidies “in a provision of the tax code directed to individuals, not States.”<sup>198</sup> Because states must receive fair notice of the consequences under federal law of declining to participate in a federal program, these other amici reasoned, § 36B must not be read in this way.<sup>199</sup> Again, perhaps. The federalism canon applies only if the statutory

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[http://www.washingtonpost.com/opinions/five-myths-about-king-v-burwell/2015/02/26/a1f8472e-ad8e-11e4-abe8-e1ef60ca26de\\_story.html](http://www.washingtonpost.com/opinions/five-myths-about-king-v-burwell/2015/02/26/a1f8472e-ad8e-11e4-abe8-e1ef60ca26de_story.html) [http://perma.cc/4ZH5-PCQH] (listing as a “myth” the dispute that “Congress made a mistake when it wrote the [PPACA]”).

<sup>192</sup> Textualism Brief, *supra* note 17, at 15; *accord* Brief for the Respondents, *supra* note 17, at 13.

<sup>193</sup> 42 U.S.C. § 18041(c)(1) (emphasis added).

<sup>194</sup> Brief for the Respondents, *supra* note 17, at 13; *accord* Textualism Brief, *supra* note 17, at 14.

<sup>195</sup> The Government and supporting amici argued further that the definitional provision, which provides that “[t]he term ‘Exchange’ means an American Health Benefit Exchange *established under section [1311]*,” 42 U.S.C. § 300gg-91(d)(21) (emphasis added), shows that a federally facilitated “Exchange” is, in the relevant sense, an Exchange “established under section [1311].” See Brief for the Respondents, *supra* note 17, at 23; Textualism Brief, *supra* note 17, at 15. This argument, however, proves too much, since accepting it would render § 36B’s language of “Exchange *established by the State under section 1311*” redundant. 26 U.S.C. § 36B (emphasis added). Far more likely is that the definitional provision contains the same scrivener’s error as § 36B.

<sup>196</sup> Federalism Brief, *supra* note 18.

<sup>197</sup> 501 U.S. 452, 460 (1991) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985)).

<sup>198</sup> Federalism Brief, *supra* note 18, at 4.

<sup>199</sup> See *id.* at 3–4.

110:811 (2016)

*The Scrivener's Error*

provision at issue is “ambiguous.”<sup>200</sup> It is doubtful, however, that § 36B is ambiguous *once a scrivener's error reading is off the table*. For that provision to be so ambiguous, the Government's “statutory surrogate” reading would, as these other amici acknowledged, have to be fairly available. Yet, for the reasons above, the availability of that reading is questionable.

Despite its apparent weakness, the majority in *King* accepted the Government's “statutory surrogate” argument.<sup>201</sup> Justice Scalia took them to task for it in dissent.<sup>202</sup> Perhaps aware he was on weak interpretive ground, Chief Justice Roberts conceded that § 36B was “inartful[lly] draft[ed].”<sup>203</sup> As Justice Scalia replied, however, unless the inartful drafting in question amounted to a scrivener's error—a claim unavailable here—it is unclear how that concession advances the majority's argument.<sup>204</sup> The majority did not reach the federalism arguments raised by amici. One suspects those arguments would have been no more persuasive to the dissenters.<sup>205</sup>

Limitations aside, the above arguments were the right ones for supporting litigants to make (and for sympathetic Justices to accept). That should, however, be troubling insofar as interpretation is supposed to be about careful reading. Consider first the “statutory surrogate” argument. Under ordinary circumstances, the plain contrast between section 1311 (state-run exchanges) and section 1321 (federally facilitated exchanges) in combination with § 36B's specific reference to section 1311 would be enough to infer that § 36B excludes section 1321. To draw that inference would just be to give effect to the precise words that Congress chose.<sup>206</sup> As argued above, there is good reason to think that, in this case, Congress chose its words not precisely but accidentally. Because of the current scrivener's error doctrine, however, that possibility was off the table.

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<sup>200</sup> *Gregory*, 501 U.S. at 470.

<sup>201</sup> See *King v. Burwell*, No. 14-114, slip op. at 10 (U.S. June 25, 2015) (“By using the phrase ‘such Exchange,’ Section 18041 instructs the Secretary to establish and operate the *same* Exchange that the State was directed to establish under Section 18031.”).

<sup>202</sup> See *id.* at 6–9 (Scalia, J., dissenting) (discussing U.S. CONST. art. I, § 4, cl. 1).

<sup>203</sup> *Id.* at 14 (majority opinion).

<sup>204</sup> *Id.* at 17 (Scalia, J., dissenting) (“Perhaps sensing the dismal failure of its efforts to show that ‘established by the State’ means ‘established by the State or the Federal Government,’ the Court tries to palm off the pertinent statutory phrase as ‘inartful drafting.’ This Court, however, has no free-floating power ‘to rescue Congress from its drafting errors.’” (citation omitted) (quoting *Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004))).

<sup>205</sup> Cf. *id.* at 13 (“Statutory design and purpose matter only to the extent they help clarify an otherwise ambiguous provision. Could anyone maintain with a straight face that § 36B is unclear?”).

<sup>206</sup> To use the earlier analogy, if Ann says that she wants a blueberry pie from “Hi-Rise Bakery,” she wants a blueberry pie from Hi-Rise Bakery.



Instead, the Government and supporting amici were left to argue that Congress chose its words precisely, but that one should not draw the inference one normally would. This form of argument is worrisome since, if accepted, it threatens to undercut Congress's ability to communicate anything specific. After all, if "section 1311" can refer to section 1311 *and* section 1321, it starts to feel like "[w]ords no longer have meaning."<sup>207</sup>

Next, consider the federalism argument. As mentioned above, clear statement rules such as the federalism canon apply only if the statutory provision at issue is unclear. The problem is that courts sometimes see unclarity precisely *because* some value (e.g., federalism, rule of law) corresponding to such a rule is implicated.<sup>208</sup> This is a serious concern to the extent one opposes the rewriting of statutes in the name of lofty constitutional values. As *King* illustrates, the current doctrine compels litigants to argue that texts are unclear in ways they are not. As a result, it is unsurprising that litigants invoke clear statement rules toward that end. Again, the current doctrine produces more "interpretive distortions"<sup>209</sup> rather than fewer.<sup>210</sup>

2. *Past Cases.*—*King* is not the first case of its kind. Start with a casebook staple. In *Public Citizen v. United States Department of Justice*,<sup>211</sup> the question before the Court was whether the Federal Advisory Committee Act (FACA) applies to the American Bar Association's Standing Committee on Federal Judiciary, which regularly consults with the Department of Justice (DOJ) regarding potential nominees for federal judgeships.<sup>212</sup> FACA requires federal "advisory committees" to open meetings, balance membership, and release public reports.<sup>213</sup> In turn, FACA defines "advisory committee" as any group "established or utilized by the

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<sup>207</sup> *King*, slip op. at 2 (Scalia, J., dissenting) ("Words no longer have meaning if an Exchange that is *not* established by a State is 'established by the State.' It is hard to come up with a clearer way to limit tax credits to state Exchanges than to use the words 'established by the State.'").

<sup>208</sup> See *Bond v. United States*, 134 S. Ct. 2077, 2090 (2014); cf. Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1, 41–42 (arguing that historical practice shapes the Court's perceptions of textual clarity and ambiguity).

<sup>209</sup> *King*, slip op. at 18 (Scalia, J., dissenting) (accusing the majority of "endur[ing] whatever interpretive distortions it takes in order to correct a supposed flaw in the statutory machinery").

<sup>210</sup> All the more so if one is skeptical of clear statement rules generally. See John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 399 (2010) (arguing that "clear statement rules rest on the mistaken premise that the Constitution contains freestanding values . . . apart from the specific terms of the clauses from which the Court derives them").

<sup>211</sup> 491 U.S. 440 (1989).

<sup>212</sup> *Id.* at 443.

<sup>213</sup> *Id.* at 446–47.

110:811 (2016)

*The Scrivener's Error*

President” or an agency to give advice on public questions.<sup>214</sup> There is “no doubt,” the Court conceded, that the DOJ “makes use” of the Standing Committee, and thus “utilizes” it in the ordinary sense.<sup>215</sup> Nonetheless, because a “literalistic” reading of “utilize” would encompass groups such as the President’s own political party, an outcome “Congress could [not] conceivably have intended,”<sup>216</sup> the Court read the term somewhat creatively, treating it as a sort of synonym of “establish.”<sup>217</sup>

“Today, *Public Citizen* is taught as a controversial case,” an instance of *Holy Trinity*-style purposivism.<sup>218</sup> But were it not for the current scrivener’s error doctrine, the Court could have avoided such reasoning altogether. As Victoria Nourse observes, as a historical matter, “[t]he term ‘utilize’ first appears in the conference committee report resolving House and Senate differences on FACA.”<sup>219</sup> Going to conference, the Senate version of FACA applied to groups “established or organized” by the Executive.<sup>220</sup> The House version, by contrast, used the term “established.”<sup>221</sup> As Nourse observes further, conference committees are constrained by rules that prohibit change to the text of a bill where both houses have agreed to the same language.<sup>222</sup> Against this backdrop, it is more likely than not that the substitution of the term “utilize” for “organized” in the final version of FACA is a simple scrivener’s error. If the substitution had been intentional, it would probably have violated the rule against substantive changes to agreed-upon text. If, instead, the substitution was accidental—predicated, maybe, on the false belief that “utilize” and “organize” are rough synonyms—the conference committee plainly stayed within its jurisdiction. And while the former assessment falls short of absurd—it is,

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<sup>214</sup> 5 U.S.C. app. § 3(2) (2012).

<sup>215</sup> *Pub. Citizen*, 491 U.S. at 452.

<sup>216</sup> *Id.* at 463–64.

<sup>217</sup> *See id.* at 462.

<sup>218</sup> Nourse, *supra* note 138, at 93; *see also Pub. Citizen*, 491 U.S. at 472 (Kennedy, J., concurring in the judgment) (“To the student of statutory construction, this move is a familiar one. It is, as the Court identifies it, the classic *Holy Trinity* argument.”); Manning, *The Absurdity Doctrine*, *supra* note 8, at 2429–30 (criticizing the Court’s reliance upon the absurdity doctrine in *Public Citizen*).

<sup>219</sup> Nourse, *supra* note 138, at 93.

<sup>220</sup> *Id.* at 94 (citing *Pub. Citizen*, 491 U.S. at 461).

<sup>221</sup> *Id.* (citing *Pub. Citizen*, 491 U.S. at 459).

<sup>222</sup> *Id.* at 94–95 (citing JOHN V. SULLIVAN, CONSTITUTION, JEFFERSON’S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES ONE HUNDRED TWELFTH CONGRESS, H.R. DOC. NO. 111-157, R. XXII(9), at 37 (2011); U.S. SENATE COMM. ON RULES & ADMIN., STANDING RULES OF THE SENATE, S. DOC. NO. 112-1, R. XXVIII(2)(a), at 52 (2011)).

of course, *conceivable* that a conference committee would flout or interpret aggressively the applicable rules—the latter is more plausible.<sup>223</sup>

Consider next *Holloway v. United States*.<sup>224</sup> In that case, the Court was asked to construe the federal carjacking statute. As written, the statute prohibits carjacking “with the intent to cause death or serious bodily harm.”<sup>225</sup> The question before the Court was whether that prohibition applies to someone who intends to kill or seriously injure only “*if necessary to effect a carjacking*.”<sup>226</sup> In *Holloway*, the only actual violence consisted of the defendant punching one of his victims in the face.<sup>227</sup> At trial, the jury was instructed that, lack of actual violence notwithstanding, so long as the defendant was willing to kill or seriously injure “*if the alleged victims had refused to turn over their cars*,” that was enough for a conviction.<sup>228</sup>

As Justice Scalia argued in dissent, the interpretation expressed by the jury instructions is difficult to square with the language of the statute. If, for example, one has a friend who is seriously ill, one does not “intend” to attend her funeral next week.<sup>229</sup> This is so, Justice Scalia argued further, even if one does intend to go to her funeral *if she dies*.<sup>230</sup> Linguistic awkwardness notwithstanding, the Court held that the statute applies even in absence of an “unconditional” intent to kill or seriously injure.<sup>231</sup> According to Justice Stevens, “commonsense” suggests that Congress “intended to criminalize a broader scope of conduct than attempts to assault or kill in the course of automobile robberies.”<sup>232</sup> For that reason, Justice Stevens concluded, “intent” must be read to encompass “conditional” intent.<sup>233</sup>

The language at issue in *Holloway* is likely attributable to a scrivener’s error. As enacted in 1992, the statute applied to anyone who,

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<sup>223</sup> Nourse argues that, attending to congressional rules, a court “should interpret ‘utilize’ precisely as a member of Congress would interpret it—as making no significant change to ‘established or organized.’” Nourse, *supra* note 138, at 95. What Nourse fails to explain, however, is how attention to such rules alleviates the linguistic awkwardness of reading the term “utilize” in this way.

<sup>224</sup> 526 U.S. 1 (1999).

<sup>225</sup> 18 U.S.C. § 2119 (2012).

<sup>226</sup> *Holloway*, 526 U.S. at 3 (emphasis added).

<sup>227</sup> *Id.* at 4.

<sup>228</sup> *Id.* (emphasis added).

<sup>229</sup> *Id.* at 14 (Scalia, J. dissenting).

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 7–8 (majority opinion).

<sup>232</sup> *Id.* at 7; *see also id.* at 12 ([W]e . . . think it unreasonable to assume that Congress intended to enact such a truncated version of an important criminal statute.”).

<sup>233</sup> *Id.* at 8.

110:811 (2016)

*The Scrivener's Error*

“possessing a firearm[,] . . . takes a motor vehicle . . . from the person or presence of another by force and violence or by intimidation.”<sup>234</sup> In 1994, Congress amended the statute, eliminating the firearm requirement and adding the death penalty for cases in which death results.<sup>235</sup> Congress also added the language at issue here, plausibly in an effort to avoid challenge under the Eighth Amendment.<sup>236</sup> As the district court observed, however, and as Justice Scalia conceded in dissent, the language at issue was likely intended to apply *only* to carjackings resulting in death.<sup>237</sup> Hence, it is likely that what Congress *meant* to say was that:

Whoever takes a motor vehicle . . . from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall (1) be fined . . . or imprisoned not more than 15 years, or both, . . . [or] (3) if death results, be . . . sentenced to death *if she acted with the intent to cause death or serious bodily harm*.

So read, the statute would have thus applied to the defendant's actions regardless of any intention to kill or seriously injure.<sup>238</sup>

Again, the above reading is the one that Congress likely intended. It is, however, at least possible that Congress meant to say what it said. As Justice Scalia observed in dissent, “[t]he era when this statute was passed contained well publicized instances . . . of carjackings in which the perpetrators senselessly harmed the car owners when that was entirely unnecessary to the crime.”<sup>239</sup> Hence, it is possible that “Congress meant to reach—as it said—the carjacker who intended to kill.”<sup>240</sup> Because the presence of a scrivener's error was not “absolutely clear,” current doctrine precluded the majority from reading the statute as Congress likely intended. In turn, it was forced to adopt a strained reading that approximated, in its legal effect, the correct one.

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<sup>234</sup> Anti Car Theft Act of 1992, Pub. L. No. 102-519, § 101, 106 Stat. 3384 (codified as amended at 18 U.S.C. § 2119 (2012)).

<sup>235</sup> Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 1970 (codified as amended at 18 U.S.C. § 2119).

<sup>236</sup> See *United States v. Holloway*, 921 F. Supp. 155, 158 (E.D.N.Y. 1996) (explaining that in the absence of that language at issue, the statute would have authorized the death penalty for an accomplice who neither killed a victim nor intended to kill or harm the victim (citing *Enmund v. Florida*, 458 U.S. 782 (1982))), *aff'd sub nom.* *United States v. Arnold*, 126 F.3d 82 (2d Cir. 1997), *aff'd sub nom.* *Holloway v. United States*, 526 U.S. 1 (1999).

<sup>237</sup> *Holloway*, 526 U.S. at 19 n.2 (Scalia, J., dissenting); *Holloway*, 921 F. Supp. at 158. Here, the best evidence is that Congress's amendment purports to amend “Section 2119(3),” the subsection of the original (and existing) statute that is a penalty provision applicable to cases in which death results. 108 Stat. at 1970.

<sup>238</sup> Needless to say, the death penalty was unavailable either way.

<sup>239</sup> *Holloway*, 526 U.S. at 18–19 (Scalia, J., dissenting).

<sup>240</sup> *Id.* at 20.

Last, take a simple case. In *United States v. Locke*,<sup>241</sup> the question was whether a requirement that a notice of complaint be filed “prior to December 31” is satisfied by a notice filed on December 31. The Court held that it is not, reasoning that a “literal reading” of the requirement would not “produce a result ‘demonstrably at odds with the intentions of its drafters.’”<sup>242</sup> As the Court reasoned, “the purpose of a filing deadline would be just as well served by nearly any date a court might choose as by the date Congress has in fact set out in the statute.”<sup>243</sup> Here again, the language at issue likely reflects a scrivener’s error.<sup>244</sup> As Justice Stevens argued in dissent, “[t]he statutory scheme requires periodic filings on a calendar-year basis,” and “[t]he end of the calendar year is, of course, correctly described either as ‘prior to the close of business on December 31,’ or ‘on or before December 31.’”<sup>245</sup> More still, the accidental substitution of “prior to” for one of the aforementioned phrases is a familiar sort of linguistic mistake. Finally, it is hard to think of “any rational basis for omitting just one day from the period in which an annual filing may be made.”<sup>246</sup> Because, however, it is at least conceivable that Congress *meant* to say “prior to,” Justice Stevens did not prevail. To claim that “prior to” just means *on or prior to* was, perhaps, a bridge too far.

3. *Future Challenges to Executive Action.*—*King* is also likely a harbinger of things to come. First, as suggested above, the enormousness and complexity of both the modern administrative state and the contemporary legislative process likely mean that contemporary statutes will themselves continue to be enormous and complex.<sup>247</sup> This, in turn, means that unintentional legislative defects will continue to be available as a basis for legal challenges to the programs those statutes create.

Second, Congress is increasingly unwilling or unable to address large problems (e.g., climate change, immigration).<sup>248</sup> For that reason, the trend of addressing such problems through ambitious executive action is likely to persist.<sup>249</sup> And, hence, so too the trend of opponents of such action

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<sup>241</sup> 471 U.S. 84 (1985).

<sup>242</sup> *Id.* at 93 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

<sup>243</sup> *Id.*

<sup>244</sup> *See id.* at 120–25 (Stevens, J., dissenting).

<sup>245</sup> *Id.* at 123.

<sup>246</sup> *Id.*; accord Mark Seidenfeld, *A Process Failure Theory of Statutory Interpretation*, 56 WM. & MARY L. REV. 467, 516–17 (2014).

<sup>247</sup> *See supra* notes 146–47 and accompanying text.

<sup>248</sup> *See supra* note 156 and accompanying text.

<sup>249</sup> *See, e.g.*, Jad Mouawad & Coral Davenport, *E.P.A. Takes Step to Cut Emissions from Planes*, N.Y. TIMES (June 10, 2015), <http://www.nytimes.com/2015/06/11/business/energy-environment/epa-says-it-will-set-rules-for-airplane-emissions.html> [http://perma.cc/KUK9-YB4V]; Michael D. Shear,

110:811 (2016)

*The Scrivener's Error*

searching for defects in the enormous and complex statutes upon which such action relies.<sup>250</sup>

Consider, for example, the recent challenge to the Environmental Protection Agency's (EPA) proposal concerning power plant emissions.<sup>251</sup> After years of congressional inaction, President Obama, acting through the EPA, has made numerous efforts to address climate change through executive action. Of these, the most ambitious is the EPA's "Clean Power Plan," which would regulate greenhouse gas emissions from power plants, the largest concentrated source of such emissions in the United States.<sup>252</sup> As is, at this point, the standard response, opponents of this policy are seeking to block it through legal challenge.<sup>253</sup> The EPA proposed the Clean Power Plan pursuant to Section 111(d) of the Clean Air Act (CAA).<sup>254</sup> Without going into the details, the problem is that, in 1990, Congress amended Section 111(d) not once, but twice. Under the pre-1990 version of the CAA, the EPA's proposal would have been plainly permissible.<sup>255</sup> In 1990, however, the House and Senate proposed separate, inconsistent amendments to Section 111(d) and, through some accident, both were enacted into law.<sup>256</sup> Under the language of the amendment that originated in

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*Obama, Daring Congress, Acts to Overhaul Immigration*, N.Y. TIMES (Nov. 20, 2014), <http://www.nytimes.com/2014/11/21/us/obama-immigration-speech.html> [http://perma.cc/VLE3-X8YD]; Mark Landler & John M. Broder, *Obama Outlines Ambitious Plan to Cut Greenhouse Gases*, N.Y. TIMES (June 25, 2013), <http://www.nytimes.com/2013/06/26/us/politics/obama-plan-to-cut-greenhouse-gases.html> [http://perma.cc/S47U-JZ5P].

<sup>250</sup> See, e.g., *Miss. Comm'n on Env'tl. Quality v. EPA*, 790 F.3d 138 (D.C. Cir. 2015) (involving challenge to Environmental Protection Agency ozone designations); *Texas v. United States*, 787 F.3d 733 (5th Cir. 2015) (involving challenge to a Department of Homeland Security program of deferred action for undocumented immigrants who are the parents of citizens or lawful permanent residents).

<sup>251</sup> See *In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. 2015) (holding that courts do not have authority to review proposed, as opposed to final, agency rules).

<sup>252</sup> See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

<sup>253</sup> See *In re Murray*, 788 F.3d at 333–34.

<sup>254</sup> See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64,663.

<sup>255</sup> The pre-1990 version of Section 111(d) obligated the EPA to require standards of performance "for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under [S]ection [108(a)] or [112(b)(1)(A)]." 42 U.S.C. § 7411(d)(1)(A) (1988). Under this version, the EPA was thus prohibited from regulating, under Section 111(d), emissions of the same *pollutant* from the same source categories as are already regulated under Section 112. The EPA regulated power plants for mercury emissions under Section 112 but not for greenhouse gas emissions. The Court invalidated the EPA's regulation of mercury emissions this Term. See *Michigan v. EPA*, No. 14-46 (U.S. June 29, 2015) (holding mercury regulation invalid because the EPA failed to consider cost of regulation). For that reason, it is possible that the challenge to the Clean Power Plan is now moot.

<sup>256</sup> Clean Air Act Amendments of 1990, Pub. L. No. 101-549, §§ 108(g), 302(a), 104 Stat. 2399, 2467, 2574 (codified at 42 U.S.C. § 7411 (2012)).

the Senate, the EPA's proposal is, as before, plainly permissible.<sup>257</sup> Under the language that originated in the House, the proposal's permissibility is less clear.<sup>258</sup> When the Office of Law Revision Counsel transcribed the 1990 amendments from the Statutes at Large into the United States Code, it codified the language that originated in the House.<sup>259</sup> Seizing in part on this choice, opponents now argue that the Plan exceeds the EPA's authority under Section 111(d).<sup>260</sup> Because the Senate language fits more neatly with the rest of the Act as amended, the retention of the House language was likely a scrivener's error.<sup>261</sup> Since, however, the House language is not plainly incompatible with the Act as amended, that error is less than "absolutely clear," i.e., it is conceivable that the retention of the Senate language was the error.

The challenge to the Clean Power Plan raises numerous questions that go beyond the scope of this Article.<sup>262</sup> For present purposes, what that challenge illustrates is just that opponents can and, this Article predicts, increasingly will identify and exploit drafting errors in the statutes upon which ambitious executive actions rely to challenge those actions. Like most such statutes, the CAA is enormous and complex. It is, for that reason, unsurprising that it contains drafting errors. This makes it almost as unsurprising that opponents of the Clean Power Plan were able to identify and exploit one such error. And since there is nothing unique about this

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<sup>257</sup> The Senate amendment replaced the cross-reference to "section 112(b)(1)(A)" with a cross-reference to "section 112(b)." § 302, 104 Stat. at 2574.

<sup>258</sup> The House amendment replaced the cross-reference to "[S]ection 112(b)(1)(A)" with the phrase "emitted from a source category which is regulated under [S]ection 112." § 108(g), 104 Stat. at 2467. Challengers argue that, under this amendment, EPA is thus prohibited from regulating under Section 111(d) any emissions from a source category once that source category's hazardous emissions have been regulated under Section 112. Final Opening Brief of Petitioner at 15–28, *In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. 2015) (Nos. 14-1112 and 14-1151), 2015 WL 1022477, at \*15–28.

<sup>259</sup> See 42 U.S.C. § 7411(d).

<sup>260</sup> See Final Opening Brief of Petitioner, *supra* note 258, at 34. *But see* *Stephan v. United States*, 319 U.S. 423, 426 (1943) (holding that "the Code cannot prevail over the Statutes at Large when the two are inconsistent"); Tobias A. Dorsey, *Some Reflections on Not Reading the Statutes*, 10 GREEN BAG 2d 283, 284 (2007) ("The Code is—no disrespect intended—a Frankenstein's monster of [Statutes at Large]. The Code is made by taking the [Statutes at Large], hacking them to pieces, rearranging them, and stitching them back together in a way that gives them false life.").

<sup>261</sup> See, e.g., Jody Freeman, *Teaching an Old Law New Tricks*, N.Y. TIMES (May 29, 2014), <http://www.nytimes.com/2014/05/30/opinion/teaching-an-old-law-new-tricks.html> [http://perma.cc/T3LU-Q6EC]; Kate Konschnik, *EPA's 111(d) Authority—Follow Homer and Avoid the Sirens*, LEGAL PLANET (May 28, 2014), <http://legal-planet.org/2014/05/28/guest-blogger-kate-konschnik-epas-111d-authority-follow-homer-and-avoid-the-sirens/> [http://perma.cc/2YQB-UGQ8].

<sup>262</sup> E.g., whether to defer to an agency's determination as to whether a statute contains a scrivener's error. See Ryan D. Doerfler, *Mead As (Mostly) Moot: Predictive Interpretation in Administrative Law*, 36 CARDOZO L. REV. 499, 500 n.4 (2014) (considering whether the case for deference is weaker in cases of ambiguity than in cases of vagueness).

110:811 (2016)

*The Scrivener's Error*

case—what agency-administered statute is *not* enormous and complex?—one should anticipate similar challenges in the future.

#### CONCLUSION

Like all speakers, Congress misspeaks. Courts pretend otherwise far too often. Under the current scrivener's error doctrine, which permits recognition only of errors that are "absolutely clear," courts make systematic interpretive mistakes. Litigants, meanwhile, are driven to distorted argumentation, which, in turn, leads courts to create distorted law. To remedy both problems, courts should recognize scrivener's errors much more freely. More specifically, courts should recognize such an error if and only if an error is more likely than not. In so doing, courts would treat Congress just like any other speaker. In this regard, that is just what Congress is.

As a practical matter, correcting the scrivener's error doctrine is increasingly important. There is no end in sight to congressional inaction. For that reason, ambitious executive action is likely the new normal. This means continuing challenges to such actions in courts. And, as both *King* and the challenge to the Clean Power Plan illustrate, such challenges will often hinge on some drafting error in the underlying statute, which is enormous and complex. The stakes in these challenges are high. The scrivener's error doctrine thus has to be right.



